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No. 286

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

SOUTHEASTERN AVIATION, INC.,
d/b/a SOUTHEAST AIRLINES,
Appellant,

vs.

A. H. HURD, Individually and as Administrator of the Estate of Phyllis Eloise Hurd Halstead, Deceased,
Appellee.

On Appeal from the Supreme Court of Tennessee.

JURISDICTIONAL STATEMENT

and

APPENDIX.

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vs.

A. H. HURD, Individually and as Administrator of the Estate of Phyllis Eloise Hurd Halstead, Deceased,
Appellee.

On Appeal from the Supreme Court of Tennessee.

JURISDICTIONAL STATEMENT.

Appellant appeals from the Judgment of the Supreme Court of Tennessee entered on March 9th, 1962 and submits this statement to show that the Supreme Court of the United States has jurisdiction of the Appeal and that a substantial question is presented.

OPINION AND JUDGMENT BELOW.

Copy of the Opinion of the Supreme Court of Tennessee appears in the Appendix hereto at pages 1a to 23a et seq., in the certified Record, Vol. VI at page 816 et seq., and is reported in 355 S. W. (2d) 436.

Copy of the Judgment of the Supreme Court of Tennessee which is appealed from appears in the Appendix hereto at pages 24a to 26a et seq.

JURISDICTION.

This is an action for damages for wrongful death arising out of an airplane crash which occurred on January 8, 1959. At that time Southeastern Aviation, Inc., d/b/a Southeast Airlines, was a Tennessee corporation operating a regularly scheduled airline between Tri Cities, Tennessee and Memphis, Tennessee under a commercial operator certificate granted to it by the Civil Aeronautics Board. On January 8, 1959 Phyllis Eloise Hurd Halstead, Appellee's intestate and a resident of Tennessee, was an intrastate fare paying passenger on Southeast Flight 308 when it crashed in Sullivan County, Tennessee. All persons aboard, including Mrs. Halstead, were killed.

Suit was filed in the Law Court at Kingsport, Tennessee, alleging that Southeastern Aviation, Inc., d/b/a Southeast Airlines, had breached certain duties which it as a common carrier of passengers for hire owed to Mrs. Halstead under the laws of the State of Tennessee and in failing to comply with rules and regulations of the Federal Aviation Agency.

Southeastern Aviation, Inc., d/b/a Southeast Airlines, removed the suit to the United States District Court for the Eastern District of Tennessee upon the theory that the action was founded upon a right or claim arising under the laws of the United States and was one of which the District Courts of the United States have original jurisdiction. Upon Motion to Remand the District Court remanded the case to the Law Court at Kingsport, Tennessee.

Thereupon by proper pleadings Southeastern Aviation, Inc., d/b/a Southeast Airlines, asserted in the Law Court at Kingsport, Tennessee that by the Federal Aviation Act of 1958 (49 U. S. C. 1301 et seq.) the Congress of the United States had pre-empted the field of the control of

airmen, aircraft and the operation of aircraft within the navigable airspace of the United States so as to make all state laws and state action in such fields ineffective.

The Trial Court held that the question of liability was to be determined by the Substantive Law of Tennessee, without regard to the Federal Scheme of regulation even though the State Substantive Law is at variance with the Federal Regulatory Plan and Scheme for control of aircraft and air navigation. The Trial Court submitted the case to the jury, which returned its verdict in favor of the plaintiff in the amount of One Hundred Forty-Five Thousand Dollars as compensatory damages and Five Thousand Dollars as punitive damages. Judgment was entered accordingly.

Upon appeal the Court of Appeals of Tennessee affirmed the holding of the Trial Court. Certiorari was granted by the Supreme Court of Tennessee and after oral argument, that court in an opinion handed down on March 7, 1962, held that the state courts have jurisdiction to hear and determine actions for wrongful death arising out of airplane crashes which occur within the navigable air space of the United States. The Tennessee Court further held that the Federal Scheme of regulation of aircraft and the operation thereof did not pre-empt the field and establish an official and uniform standard for the control and operation of aircraft in the navigable air space of the United States, but that Tennessee state law, even though in conflict or at variance with the Federal Plan, would support an action for damages.

The Judgment of the Supreme Court of Tennessee was entered on March 9, 1962, and Notice of Appeal was filed in that Court on June 1, 1962.

The jurisdiction of the Supreme Court of the United States to review this decision by direct Appeal is conferred by Title 28, U. S. C., Section 1257 (2).

The following decisions sustain the jurisdiction of the Supreme Court to review the Judgment in this case on direct Appeal:

DeVeau v. Braisted, 363 U. S. 144;
La Crosse Tel. Corp. v. Wisconsin Board, 336 U. S. 18;
Dahnke-Walker Milling Company v. Bondurant, 257 U. S. 282.

STATUTES INVOLVED.

The statutes involved herein are:

1. **Sections 42-106 and 42-107 of Tennessee Code Annotated.**

These statutes are set forth on pages 27a to 28a of the Appendix hereto.

2. **The Constitution of the United States, Article 1, Section 8, Clause (3) and Article 6, Paragraph (2).**

These provisions are set forth on pages 29a to 30a of the Appendix hereto.

3. **The Federal Aviation Act of 1958—Public Law 85-726; 72 Stat. 731 (49 U S. C., Section 1301 et seq.).**

The pertinent portions of this Act are set forth on pages 31a to 50a of the Appendix hereto.

4. **The Civil Air Regulations of the Federal Aviation Agency, 14 CRF 20.1 et seq.**

The pertinent portions of these Regulations are set forth on pages 51a to 56a of the Appendix hereto.

QUESTIONS PRESENTED.

1. Has the Congress by the enactment of the Federal Aviation Act of 1958, 72 Stat. 731 (49 U. S. C., Section 1301 et seq.) with its declaration of national sovereignty

in the navigable airspace of the United States, and its comprehensive plan for national air commerce regulating in minute detail virtually every aspect of air transit from construction and planning of ground facilities and the design and construction of aircraft to safety and methods of flight operations, pre-empted the field and displaced State power to deal with such matters? Specifically does the Federal Aviation Act of 1958:

(a) Preclude the Courts from applying State law, whether or not such State law is at variance with the Regulations issued by the Administrator of the Federal Aviation Agency, as a criterion for determining liability in tort cases arising out of airplane accidents?

(b) Make unconstitutional, as an undue interference with interstate commerce in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States, law of the State of Tennessee purporting to regulate aircraft and the flight thereof in the airspace of the United States over the geographical boundaries of the State of Tennessee?

(c) Make unconstitutional, as a violation of the Supremacy Clause of the Constitution of the United States (Clause 2, Article 6) the application of Tennessee law to aircraft and the operation thereof in the navigable airspace of the United States above the geographical boundaries of the State of Tennessee?

(d) Preclude the State Courts from jurisdiction to award damages for wrongful death arising out of an airplane crash?

STATEMENT.

Appellant, hereinafter referred to as Southeast, was on and prior to January 8, 1959 a Tennessee corporation operating a scheduled airline between Tri Cities, Tennessee and Memphis, Tennessee under a commercial, oper-

ator's certificate granted to it by the Civil Aeronautics Board, an agency of the United States Government. On that date, Phyllis Eloise Hurd Halstead was a fare-paying passenger on Southeast Flight 308 which crashed on Holston Mountain in Sullivan County, Tennessee. Mrs. Halstead and all other persons aboard the plane were killed. The Appellee, A. H. Hurd, is the father and next of kin of Phyllis Eloise Hurd Halstead and the Administrator of her estate. Hurd, as the surviving father and as Administrator of the estate of Phyllis Eloise Hurd Halstead, instituted suit in the Law Court at Kingsport, Tennessee seeking damages for her alleged wrongful death. In the Declaration it was alleged that Southeast was guilty of negligence in that it failed to comply with the applicable rules and regulations of the Federal Aviation Agency and with the applicable laws of the State of Tennessee (Record, Vol. I, pp. 1-9).

Southeast removed the case to the United States District Court for the Eastern District of Tennessee, Northeastern Division, upon the ground that the action was founded upon a right arising under the laws of the United States and was one of which the District Courts of the United States have original jurisdiction (Record, Vol. I, pp. 11-18). The District Court, upon motion, remanded the action to the State Court (Record, Vol. I, p. 86F).

Thereupon Southeast filed Special Pleas asserting that by the Federal Aviation Act of 1958, 72 Stat. 731 (49 U. S. C., 1301 et seq.), the Congress of the United States had preempted the field so as to:

1. Exclude the Law Court at Kingsport and all other State Courts from jurisdiction of the subject matter;

2. Render all laws of the State of Tennessee, whether statutory or common law, dealing with aircraft and the operation of aircraft inoperative; and

3. Make the common law of Tennessee inapplicable to the occurrence described in plaintiff's Declaration because the application of such law would conflict with the Federal Plan, and because the application of such state law is prohibited by the Supremacy Clause (Article 6, Clause 2) of the Constitution of the United States (Record, Vol. I, pp. 27, 33-39).

Hurd demurred to the Pleas which raised these questions and the Trial Court sustained the Demurrer to each Plea (Record, Vol. I, pp. 47-49).

The case then proceeded to issue and came on for trial before a jury (Record, Vol. II, p. 86). During the course of the trial and over the objection of Southeast the Trial Court permitted the introduction of evidence in support of the plaintiff's assertion that the defendant violated the laws of Tennessee. For example over the objection of the defendant, the Trial Court permitted the witness Putney to testify that in his opinion the plane involved should have been equipped with two automatic direction finders (Record, Vol. III, pp. 416-420), even though the Civil Air Regulations pertaining to the operations of commercial air carriers including Southeast Airlines provides (Civil Air Regulations Section 40.232(b), 14 CFR 40.232 (b). See Appendix page 54a):

> "In the case of operation on routes using procedures based on automatic direction finding, only one automatic direction finding system need be installed: . . ."

In permitting the introduction of this testimony and in the charge given to the jury by the Trial Judge in his instructions the Court followed the law of Tennessee (Record, Vol. IV, pp. 627-657), which is in conflict with the above-quoted Civil Air Regulation.

The jury returned its verdict in favor of the plaintiff in the amount of One Hundred Forty-Five Thousand Dol-

lars ($145,000.00) for compensatory damages and Five Thousand Dollars ($5,000.00) for punitive damages (Record, Vol. IV, p. 659) and judgment was entered accordingly (Record, Vol. I, p. 61).

Thereupon Southeast filed its Motion for New Trial again asserting that Congress had pre-empted the field so as to exclude state courts from jurisdiction of the subject matter and so as to make the federal law and not the state law the criteria by which liability for torts arising out of the operation of an aircraft is to be determined (Record, Vol. I, pp. 64-65). The Trial Court overruled the Motion for New Trial and an Appeal was perfected to the Court of Appeals of Tennessee.

In that Court Southeast assigned as error the action of the Trial Court in sustaining the Demurrers to its Pleas raising the federal questions, in admitting testimony in support of the contention that Southeast was guilty of negligence under the law of Tennessee and in instructing the jury as to the law of Tennessee (Record, Vol. VI, pp. 719-723, 725-731).

The Court of Appeals in a written Opinion noted the defendant's insistence that the Congress had pre-empted the field of operation of aircraft in the navigable air space of the United States by the enactment of the Federal Aviation Act of 1958 (72 Stat. 731 et seq., 49 U. S. C., Section 1301 et seq.).

The Court of Appeals of Tennessee in affirming the judgment of the Trial Court and holding that by the enactment of the Federal Aviation Act of 1958 the Congress had not pre-empted the field, based its decision upon the savings clause contained in the Federal Aviation Act (72 Stat. 798, 49 U. S. C. 1506), which reads as follows:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at

common law or by statute, but the provisions of this chapter are in addition to such remedies."

This intermediate appellate court concluded its opinion on this question in this language:

> "Wherefore, we hold 49 U. S. C. A., Section 1506 expressly preserved the existing remedies under the state common law; and the position taken by defendant in this Court to the contrary cannot be upheld."

Having thus decided that the law of Tennessee was applicable, the Court of Appeals of Tennessee proceeded to apply such law holding that thereunder: "Two ADF's are required on each plane to meet the highest skill of the art." (Record, Vol. VI, pp. 740-747), which is in direct conflict with the Rules and Regulations of the Federal Aviation Agency which we have quoted above.

The Final Judgment of the Court of Appeals of Tennessee affirmed the Judgment as entered in the Law Court at Kingsport (Record, Vol. VI, p. 757).

Southeast then filed in the Supreme Court of Tennessee its Petition for Writ of Certiorari to Review and Reverse the Final Judgment as Rendered by the Court of Appeals of Tennessee, Eastern Division (Record, Vol. VI, pp. 759-814). In the Petition and in the Assignments of Error and Brief in Support Thereof filed in the Supreme Court of Tennessee, Southeast again raised the pre-emption questions.

The Petition for Certiorari was granted by the Supreme Court of Tennessee and the cause placed on the docket of that Court for argument (Record, Vol. VI, p. 815).

After argument, in an Opinion reported in 355 S. W. 2d 436, copy of which is set forth at pages 1a to 23a of the Appendix filed with this brief, the Supreme Court of Tennessee held that the Federal Aviation Act does not pre-empt the field of the control of the navigable airspace

in the United States nor of the operation of aircraft therein. It held that this Act is merely an administrative measure limited to the regulation of the operation of aircraft in the interest of public safety and does not supersede or make unconstitutional state law which is not inconsistent with the provisions of the Federal Act. In its Opinion, the Supreme Court of Tennessee said:

"**First.** Petitioner contends that by the Federal Aviation Act of 1958, 49 U. S. C. A., sec. 1301 et seq., Congress took control of the airspace of the United States, set up a federal agency to license and regulate the operation of aircraft, and pre-empted the field so as to supplant all state law and state court jurisdiction therein; and that this action should be dismissed because the state court has no jurisdiction of it and no state law may be applied to it.

"Petitioner mainly relies upon the parts of the Aviation Act of 1958 carried in 49 U. S. C. A., sections 1508 (a) (as to airspace), 1421 (as to power and duty of the Administrator to fix regulations and minimum standards), and 1471-1473 (as to penalties for violations of certain provisions of the Act). The material part of section 1508 (a) is in these words:

" 'The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction . . .' (49 U. S. C. A., sec. 1508).

"The substance of section 1421 is that the Administrator of the Federal Aviation Agency is empowered, and it is made his duty, to promote safety of flight of civil aircraft in air commerce by prescribing rules,

regulations, and minimum standards for the design of aircraft, appliances, inspections, maximum hours of service of airmen and other employees, and such other matters as the Administrator may find necessary to provide adequately for safety in air commerce, having regard 'to the duty resting upon air carriers to perform their services with the highest possible degree of safety.'

"It appears the purpose of the Federal Aviation Act of 1958 is to take control of the airspace of the United States, to set up federal agencies to license and regulate the operation of aircraft, and to provide rules, regulations and minimum standards to promote the efficiency and safety of such operation, and generally to accomplish the purpose of the Act. Air Lines Pilots Association, International, v. Quesada (1960), 276 F. 2d 892, 894-895.

"It seems clear this Act does not exclude state law not inconsistent with its purpose. But for another and stronger reason we think the state court has jurisdiction in this case. Respondent's (plaintiff's) declaration charged common-law negligence in several particulars, negligence in violating certain regulations of the Civil Aeronautics Board, and negligence so extreme as to be gross and wanton. That is, it is a suit in tort upon a right created by the law of the state, and not a case arising 'under the Constitution or laws of the United States.'"

Thus the Supreme Court of Tennessee held that the Federal Aviation Act of 1958 did not pre-empt the field and that civil disputes arising out of the operation of aircraft in the navigable airspace of the United States are to be determined by the substantive law of the various states and in the state courts of the various states. In other words, the Court held that the general scheme of regulation of the airspace and the operation of aircraft therein

as set forth in the Federal Aviation Act has left room for each state to provide rules, regulations and standards which will govern within the respective states the operation of aircraft, provided the state rules and regulations are not inconsistent with the purpose of the Federal Act.

The Court also held that the Tennessee law which was applied in the trial of this case by the Trial Court is not inconsistent with the Federal Act and hence was properly applied in this case.

The result of this determination is to hold constitutional Sections 42-106 and 42-107 of Tennessee Code Annotated, which apply to liability for damages growing out of the operation of aircraft.

The Congress of the United States having set up, under the Commerce Clause of the Constitution of the United States, a comprehensive plan or scheme for the control of the airspace, aircraft and the operation thereof, such plan is the supreme law of the land. Hence, the ruling of the Supreme Court of Tennessee is, we submit, erroneous on two grounds:

1. The Federal scheme of regulation has left no room for State regulation or the application of state law in actions for damages of the type here involved.

2. The state law which the Supreme Court of Tennessee held was properly applied by the Trial Court is inconsistent with the rules and regulations issued pursuant to the Federal plan.

For both of these reasons the Tennessee State Statute is violative of the Federal Constitution.

In view of the recent decision in the case of **Campbell v. Hussey**, 368 U. S. 297, conflict between the Federal and the State statutes may not be too important in the considering of the question of pre-emption. Nevertheless we feel that this Court's attention should be called to the fact

that there is a direct conflict between the laws of Tennessee, upheld as constitutional and applied by the Supreme Court of Tennessee, and the rules and regulations of the Federal Aviation Agency here involved.

Through all of the state courts, the plaintiff contended that the defendant airline violated the law of Tennessee in a number of particulars. He specifically averred negligence because the plane here involved was not equipped with two ADF's. The Trial Court submitted to the jury the question of whether or not failure to have the plane equipped with two ADF's was negligence. The Court of Appeals of Tennessee in its Opinion made the flat statement: "The plane was equipped with only one ADF. The highest standard of the art required two." The Supreme Court of Tennessee said:

> "The proof was that most up to date aircraft now are equipped with two ADF's and that two on each plane are necessary to meet the highest skill of the art."

Civil air regulations dealing with radio equipment required on planes operated by commercial carriers cover the question of the number of ADF's required on such planes. This rule is found in 14 CFR 40.232 (b) (Appendix, p. 54a) and reads as follows:

> "b. In the case of operation on routes using procedures based on automatic direction finding, only one automatic direction finding system need be installed: . . ."

THE QUESTIONS HERE PRESENTED ARE SUBSTANTIAL.

The question of pre-emption here presented has not heretofore been passed upon by this Court. It is a question of vital importance to the transportation industry

of this country and to the American public. It is important that all those who operate the air carriers, the public who use this method of transportation and the Courts which determine the rights of those who may suffer loss as a result of this type of transportation know whether safety of equipment and care in the operation thereof, as well as liability for damages resulting from want of care, are to be determined under one uniform plan and set of rules and regulations or are to be determined in the midst of uncertainty and confusion brought about as the result of different standards established by the fifty states.

This Court will take judicial knowledge of the enormous increase in air travel which has occurred during the last decade (this increase is graphically set forth in the 1961 edition of the Handbook of Airline Statistics as published by the Civil Aeronautics Board) and of the frequency of, and the terrific loss of life and property due to, airplane crashes. We submit that both of these facts emphasize the importance of the determination by this Court of the question of pre-emption which is definitely presented in the present case.

The legislative history of the enactment of the Federal Aviation Act (U. S. Code Congressional and Administrative News, 1958, Vol. 2, pp. 3741 and 3751) reflects the intent of Congress to establish an official standard for the control of the navigable airspace of the United States and the operation of aircraft therein. Such a standard must, of course, be uniform throughout the United States to eliminate confusion which will otherwise result from the observance of standards which will vary from state to state.

Whether Congress, in the enactment of the Federal Aviation Act, accomplished the purpose it so evidently attempted to accomplish thereby presents, we submit, a ques-

tion so important and so substantial as to require the plenary consideration of this Court.

The question of whether the Federal Aviation Act of 1958 also precludes the State Courts from jurisdiction to award damages for wrongful death arising out of a airplane crash which occurs within the area to which this Act is applicable is likewise a substantial one. In the enactment of this statute Congress indicated a purpose that the Federal Courts shall fashion Federal law to enforce and protect all rights arising under this statute. In other words, as this Court has said with reference to the enforcement or protection of rights arising within the field covered by the National Labor Relations Act, the substantive law to be applied under this Act is Federal law which the Courts must fashion from the policy of the National law.

The Act itself (49 U. S. C., Section 1473) prescribes the venue and procedure for disposing of offenses committed in violation of the Act, and the closing paragraph of this section of the Act reads as follows:

> "(4) The Supreme Court of the United States, and under its direction other courts of the United States, may prescribe rules regulating such proceedings in any particular not provided by law."

In view of the fact that this Act provides for a uniform official standard for the control and use of airspace under a plan or scheme which is to be administered at least to some extent under the direction of this Court and other Courts of the United States, it would seem to be clear that the exclusive jurisdiction for the trial of cases of the type here involved is vested solely in the Federal Courts.

Regardless of such apparent clear intention on the part of the Congress, as shown by the Act, the Supreme Court of Tennessee has held that State Courts have the power and jurisdiction to hear and determine such controversies.

We submit, therefore, that the question of whether State Courts are precluded from jurisdiction to award damages in cases of this type presents a very important and substantial question.

CONCLUSION.

We submit that the decision of the Supreme Court of Tennessee in upholding the constitutionality of the Tennessee statutes here involved and in failing to hold that the Federal Aviation Act of 1958 pre-empted the field of the regulation of the use of the navigable airspace and of the construction, maintenance and operation of aircraft therein is erroneous. We further submit that the holding of the Tennessee Supreme Court that the statutes of the State of Tennessee give the State Courts jurisdiction to hear and determine cases of the type here involved is violative of the Federal Constitution.

We believe that the questions presented by this Appeal are substantial and that they are of great public importance.

Respectfully submitted,

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Southeastern Aviation, Inc., d/b/a Southeast Airlines,

Petitioner,

v.

A. H. Hurd, Individually and as Administrator of Phyllis Eloise Hurd Halstead, Deceased,

Respondent.

OPINION OF SUPREME COURT OF TENNESSEE.

Filed March 7, 1962.

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v.

A. H. Hurd, Individually and as Administrator of Phyllis Eloise Hurd Halstead, Deceased,

Respondent.

Sullivan Law.

Supreme Court of Tennessee.

On Petition for Certiorari to the Court of Appeals.

Honorable John R. Todd, Circuit Judge, Law Court at Kingsport.

Filed March 7, 1962.

Lacy West and Joseph O. Fuller, of Kingsport, and Erma G. Greenwood and R. R. Kramer, Dye, McNabb & Greenwood of Knoxville, of Counsel, All for Petitioner, Southeastern Aviation, Inc.

Preston H. Taylor, Wilson, Worley & Gamble, All of Kingsport, for Respondent, A. H. Hurd.

Modified and Affirmed.

S. L. Felts,
Justice.

Southeastern Aviation, Inc., d/b/a Southeast Airlines,

Petitioner,

v.

A. H. Hurd, Individually and as Administrator of Phyllis Eloise Hurd Halstead, Deceased,

Respondent.

Sullivan Law.

Opinion.

This was an action brought by respondent against petitioner for alleged wrongful death of his intestate, Mrs. Phyllis Eloise Hurd Halstead. In the Trial Court there was a verdict and judgment for him, which was affirmed by the Court of Appeals. We granted certiorari and the case has been heard here.

Petitioner was a common carrier of passengers by air, a Tennessee corporation, operating an intra-state airline in Tennessee between Memphis and Tri-City Airport and intermediate points. On January 8, 1959, at about 8:30 P. M., its DC-3 plane, on its regular scheduled flight from Memphis to Tri-City Airport, failed to land at that airport, but flew on beyond some 20 miles, and crashed into the side of Holston Mountain in Tennessee, killing all of its passengers and its crew.

Among the passengers thus killed were Mrs. Phyllis Eloise Hurd Halstead and her husband, Frank Halstead. Neither of them ever had a child. Her surviving next of kin was her father; and he, individually and as her administrator, brought this action for damages for her death, charging it was caused by petitioner's negligence in the operation of its plane, in a number of particulars set out in the declaration.

Petitioner removed the case to the United States District Court, claiming it was a "case arising under the laws of the United States." That court overruled this claim and remanded the case. Petitioner then set up certain defenses by pleas and motions, which were overruled, and the case was submitted to the jury. They returned a verdict for respondent for $150,000.00—$145,000.00 compensatory and $5,000.00 punitive. The Trial Court accordingly entered judgment, which was affirmed by the Court of Appeals.

Petitioner urges here three main matters for dismissal and a number of others for reversal and a new trial. It insists (1) that this case should be dismissed under the doctrine of federal pre-emption; (2) that it should also be dismissed because no right of action survived for the death sued for, either under the law of Tennessee or the law of the United States; and (3) that a verdict should have been directed for petitioner because the undisputed evidence was that the death was due not to its negligence, but to unavoidable accident.

First. Petitioner contends that by the Federal Aviation Act of 1958, 49 U. S. C. A., sec. 1301, et seq., Congress took control of the airspace of the United States, set up a federal agency to license and regulate the operation of aircraft, and pre-empted the field so as to supplant all state law and state court jurisdiction therein; and that this action should be dismissed because the state court has no jurisdiction of it and no state law may be applied to it.

Petitioner mainly relies upon the parts of the Aviation Act of 1958 carried in 49 U. S. C. A., sections 1508 (a) (as to airspace), 1421 (as to power and duty of the Administrator to fix regulations and minimum standards), and 1471-1473 (as to penalties for violations of certain provisions of the Act). The material part of section 1508 (a) is in these words:

"The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction . . ." (49 U. S. C. A., sec. 1508).

The substance of section 1421 is that the Administrator of the Federal Aviation Agency is empowered, and it is made his duty, to promote safety of flight of civil aircraft in air commerce by prescribing rules, regulations, and minimum standards for the design of aircraft, appliances, inspections, maximum hours of service of airmen and other employees, and such other matters as the Administrator may find necessary to provide adequately for safety in air commerce, having regard "to the duty resting upon air carriers to perform their services with the highest possible degree of safety."

It appears the purpose of the Federal Aviation Act of 1958 is to take control of the air space of the United States, to set up federal agencies to license and regulate the operation of aircraft, and to provide rules, regulations and minimum standards to promote the efficiency and safety of such operation, and generally to accomplish the purpose of the Act. Air Lines Pilots Association, International v. Quesada (1960), 276 F. 2d 892, 894-895.

It seems clear this Act does not exclude state law not inconsistent with its purpose. Its language above quoted (sec. 1508 (a)) is the same as that of the Civil Aeronautics Act of 1938, 49 U. S. C. A., section 176 (a), which was held not to exclude consistent state law—a law of Nebraska taxing aircraft used interstate in landing on and

departing from airports within that state. Braniff Airways v. Nebraska State Board, 347 U. S. 590, 98 L. Ed. 970.

There, the Court said that "these Federal Acts [the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938] are bottomed on the commerce power of Congress, not on national ownership of the navigable airspace, as distinguished from sovereignty"; and that federal power over navigable airspace, like federal power over navigable streams, "does not prevent state action consistent with that power." To the same effect: Huron Portland Cement Co. v. Detroit (1960), 362 U. S. 440, 4 L. Ed. 2d 852.

The conclusion that the Federal Aviation Act of 1958 does not exclude consistent state law, or alter existing remedies under state law, seems to be strengthened by the words of the savings clause of that Act (U. S. C., A., sec. 1506), which are as follows: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

The Court of Appeals put its decision upon this savings clause, citing Erie R. Co. v. Tompkins, 82 L. Ed. 1188, 304 U. S. 64, 114 A. L. R. 1487, to the effect that "there is no federal general common law", and holding that this saving of "the remedies now existing at common law or by statute" refers to the common law and statutes of the several states. Learned counsel for petitioner insists that this reference is not to state law, but to federal law. We think this argument is unsound. Porter v. Southeastern Aviation, Inc. (1961), 191 Fed. Supp. 42, 43.

The language of this savings clause, above quoted, is the same as that of the Interstate Commerce Act (49 U. S. C. A., sec. 22), which has been held to refer to the remedies under the common law and statutes of the several states and to preserve their "general and concurrent

jurisdiction" in suits for damages against an interstate carrier. Pennsylvania R. Co. v. Puritan Coal Mining Co., 237 U. S. 121, 130, 59 L. Ed. 867, 872; Pennsylvania R. Co. v. Sonman S. C. Co., 242 U. S. 120, 61 L. Ed. 188; Central New England Ry. Co. v. Boston & Albany R. Corp., 279 U. S. 415, 420, 73 L. Ed. 770, 775.

The Federal Aviation Act of 1958 appears to be merely an administrative measure, limited to the regulation of the operation of aircraft in the interest of public safety. It does not touch the traditional area of the law of torts or private right, and does not give any remedy for an injury to such right, such as an injury to the person of a passenger caused by an air carrier's negligence in the operation of its plane.

Petitioner likens this Act to the Labor Management Relations Act which pre-empts the field and excludes state law in labor disputes. But since the latter affords no remedy for recovery of damages caused by a tort, state courts have jurisdiction in such a case to award damages according to "its traditional law of torts." United Construction Workers v. Laburnum Construction Corp., 347 U. S. 656, 98 L. Ed. 1025; Int. Union, U. A. A. & A. I. W. v. Russell, 356 U. S. 634, 2 L. Ed. 2d 1030; cf. San Diego Bldg. Trades Council v. Garmon, 359 U. S. 236, 243-244, 3 L. Ed. 2d 775, 782, with Charles Dowd Box Co., Inc. v. John F. Courtney et al. (Feb. 19, 1962), ... U. S. ..., ... L. Ed. 2d ....

But for another and stronger reason we think the state court has jurisdiction in this case. Respondent's (plaintiff's) declaration charged common-law negligence in several particulars, negligence in violating certain regulations of the Civil Aeronautics Board, and negligence so extreme as to be gross and wanton. That is, it is a suit in tort upon a right created by the law of the state, and not a

case arising "under the Constitution or laws of the United States."

Nor did it lose its character as an action for negligence under state law because it also averred a violation of regulations of the Civil Aeronautics Board. Such averment merely added another ground of negligence for recovery; it did not raise an issue of federal law or invoke a federal right which would be supported if such law were given one construction or effect and defeated if given another. Dennis v. Southeastern Aviation, Inc., 176 Fed. Supp. 542, 543; Pan American P. Corp. v. Superior Court, ... U. S. ..., 6 L. Ed. 2d 584, 589-591, and cases there cited.

It was for this reason that this case was held not removable, not being a case under the Constitution or the laws of the United States, or of diversity of citizenship. The same conclusion was reached by the United States District Courts in two other similar cases growing out of the same accident. Dennis *v.* Southeastern Aviation, Inc., supra, 176 Fed. Supp. 542; Porter v. Southeastern Aviation, Inc., supra, 191 Fed. Supp. 42.

Second. Petitioner insists that this action for the wrongful death of Mrs. Halstead cannot be maintained because no right of action survived for her death, since she left no one for whom such right survived under the Tennessee wrongful death statute (T. C. A. 20-607, 610-611), the material parts of which are as follows:

> "20-607.—The right of action which a person . . ., whose death is caused by the wrongful . . . killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate, . . . but shall pass . . . to his next of kin; or to his personal representative, for the benefit of his widow or next of kin . . . In the case of the death of a married woman, such right of action shall pass to the surviving husband."

"20-610.—The damages which may be recovered for the wrongful killing of any married woman shall go to the surviving husband and children of the deceased equally, the husband taking a child's share, and if any child be dead leaving descendants, such descendants shall take the deceased child's part. If there are no children nor descendants of children, then the damages shall go exclusively to the husband . . ."

"20-611.—A suit for the wrongful killing of the wife may be brought in the name of the husband for the benefit of himself and the children of the wife, or in the name of administrator of the deceased wife, or in the name of the next of kin of the wife . . ."

It was stipulated that Mrs. Halstead and her husband were passengers on petitioner's plane when it crashed on Holston Mountain in Tennessee; that both of them died of the injuries thus received; and that there was "no sufficient evidence" that they "died otherwise than simultaneously." She had no descendant and her surviving next of kin was her father, respondent.

Upon this it is argued that it must be taken as a fact that her husband did not survive her, but both died "simultaneously"; that since she was a "married woman" and left no "surviving husband" or "children," or "descendants," no right of action survived for her death under our statute above quoted.

The argument is that there still prevails in this State the common law rule, that a personal action dies with the person, except where its survival is provided for by statute; that our statute provides for such survival only for those named as beneficiaries therein; and that the only persons named in the statute as beneficiaries for whom a right of action for the wrongful death of a "married

woman" survives are her "surviving husband," and "children" (or descendants); and since Mrs. Halstead left none of these, no right of action survived for her death.

The Court of Appeals expressed the view that the question of survival of a right of action for Mrs. Halstead's death, upon the facts of this case, was ruled by our Simultaneous Death Act (T. C. A. 31-502), which is in these words:

> "Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this chapter."

That Court reasoned that the word "property" included not only "money;" etc., but also "things in action" (T. C. A. 1-305 (15)); that the right of action for Mrs. Halstead's death preserved by our statute is the right she would have had, had she not died, and that this right passed as property of hers under the Simultaneous Death Act as if she "had survived her husband" and died as a widow.

Petitioner, however, contends that she did not in fact survive her husband and die as a widow, but died at the same time with him as a "married woman"; that while the Simultaneous Death Act affected the disposition of her property, it did not purport to amend the wrongful death statute or affect the question of survival of a right of action for her death under that statute; and that that statute preserved such right only for her "surviving husband" or "descendants," but not for her next of kin or father.

The manner in which our present wrongful death statute (T. C. A. 20-607, 610-611) has been made up through the

years by a patchwork of a number of Acts lends plausibility to petitioner's argument. An examination of such statutes separately, however, we think, shows the fallacy of this contention—shows that the right of action for wrongful death of a married woman survives for her surviving husband and descendants, if any; if none, for her "**next of kin**," including a parent or collateral.

Our first wrongful death statutes were Chapter 58, Acts of 1849-50, and Chapter 17 of the Acts of 1851-52, which were codified in our first official Code of 1858, the pertinent parts of which are as follows:

> "2291. The right of action which a person . . . whose death is caused by the wrongful act or omission of another, would have had against the wrongdoer, in case death had not ensued, shall not abate . . . but shall pass to his personal representative for the benefit of his widow and next of kin, free from the claims of his creditors."
>
> "2292. The action may be instituted by the personal representative of the deceased; but if he decline it, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit, on giving bond and security for costs, or in the form prescribed for paupers . . ."
>
> "2293. If the deceased had commenced an action before his death, it shall proceed without a revivor. The damages shall go to the widow and next of kin, free from the claims of the creditors of the deceased, to be distributed as personal property."

As has often been said, this statute creates no new right, but merely keeps alive the right the deceased would have had, and passes it to his personal representative for the benefit of his "widow and next of kin," the

recovery being no part of his estate, but being distributed as personal property, free from the claims of his creditors. Memphis St. Ry. Co. v. Cooper, 203 Tenn. 425, 313 S. W. 2d 444; Brown v. Selby, 206 Tenn. 71, 74, 332 S. W. 2d 166.

This statute (2291-2293) does not mention a **married woman** or a **child**, but uses the words "a **person** whose death," *etc.*, as being the one whose right of action is kept alive. The word "person" is comprehensive and embraces every human being, male and female, married and single; and the words "**his widow** and **next of kin**" may include persons of either sex, under the rule of construction that words "importing the masculine gender may include the feminine and neuter" (1858 Code, sec. 50, T. C. A. 1-3**0**4).

Accordingly, this statute has been construed as "not being limited to the case of a killing of a husband or father, but as designed to **abrogate the common law rule**, *and to include* **every case of wrongful killing**, *including* that of an infant or a **married woman**" (emphasis ours) (Trafford v. Adams Express Co., 76 Tenn. 96, 100). Bream v. Brown, 45 Tenn. 168; Railway Co. v. Lilly, 90 Tenn. 563.

In Bream v. Brown, supra, and Trafford v. Adams Express Co., supra, it was held that under the statute (2291-2293) the right of action for the wrongful death of a married woman survived and passed to her administrator; and that her husband was entitled to the recovery *jure mariti*, or as a beneficiary named in the statute. These cases were approved in Railway Co. v. Lilly, supra, where the Court said:

> "The person whose right of action shall not abate or be extinguished by death, may be an infant in its mother's arms (Louisville and Nashville Railroad

Company v. Connor, 9 Heis., 19), or a married woman (Bream v. Brown, 5 Cold., 168); and in the latter case the husband, if living, is entitled to the recovery, upon the ground that the word 'widow,' as used in the statute, includes both the feminine and the masculine gender, and means either widow or widower, as the case may be. Trafford v. Adams Express Company, 8 Lea, 96."

Under this statute, as construed by these cases, it is clear that the right of action for the wrongful death of a married woman survives and passes to her personal representative for her surviving husband, if any; if none, then for the benefit of her next of kin, which, of course, would include a descendant, a parent, or a collateral, as the case might be.

By Chapter 86, Acts of 1897, it was provided that "the damages which may be recovered for the wrongful killing of any married woman shall go to the surviving husband and children of the deceased equally . . . "; if no children or descendants of children, then exclusively to the husband. It was further provided that the suit may be brought in the name of the husband, or in the name of her administrator.

Thus, the Act of 1897 did not, by its terms, apply to a case of wrongful death of a married woman who (dying simultaneously with her husband) left no surviving husband and no children (or descendants), where the right of action passed to her administrator for the benefit of her next of kin. The statute (2291-2293) as applied to that kind of case, was not touched by the 1897 Act, but remained as it stood before that Act.

Our wrongful death statute (2291-2293) was re-enacted into our 1932 Code (secs. 8236-8238), without material modification so far as concerns the question here involved.

So, these provisions of the 1932 Code are to be given the same construction as before, upon the rule that where a statute which has received a judicial interpretation is re-enacted, such interpretation "forms a part of the enactment." Smith v. North Memphis Savings Bank, 115 Tenn. 12, 30, 89 S. W. 392, ...

The 1897 Act was brought forward into the 1932 Code (secs. 8239 and 8241), with one significant change: by adding the words "the next of kin of the wife" as one of the classes of persons who could sue for her wrongful death, making section 8339 read as follows:

> "A suit for the wrongful killing of the wife may be brought in the name of the husband for the benefit of himself and the children of the wife, or in the name of administrator of the deceased wife, or **in the name of the next of kin of the wife"** (emphasis ours).

Thus, this statute authorizes a suit for wrongful death of the wife to be brought by her husband, by her administrator, or by her next of kin; that is, where she left no surviving husband or descendant, such a suit may be brought by her next of kin, e. g., a parent, as in this case. This seems a legislative recognition of the prior construction of our statute that such right of action does survive to her next of kin, if she leaves no surviving husband.

The idea that such right of action survives to her next of kin (including a parent), is further borne out by the amendment made by the 1950 Code Supplement (sec. 8236), providing for such survival "where his or **her** natural parents or parent or next of kin are unknown, then to his or her legally adoptive parent or parents . . ." (emphasis ours).

Chapter 210, Acts of 1953, amended the 1950 Code Supplement by adding at the end of section 8236, this: "In

the case of the death of a married woman, such right of action shall pass to the surviving husband." It also amended 1932 Code Supplement (sec. 8239), by adding a provision that the husband may compromise such a suit or release such a right of action.

Thus, this 1953 Act, by its own terms, applied only to the case of the death of a married woman who left a surviving husband; it could not apply where there was no such husband; nor did it affect the rights of her next of kin where she left no surviving husband or descendant, or modify the pre-existing law in such a case.

Recurring to T. C. A. 20-607, et seq., above quoted, it will be seen that 607 is a re-enactment of our prior statutes (1858 Code, sec. 2291; 1932 Code 8236; 1950 Code Supp., sec. 8236; Acts of 1953, Chapter 210, sec. 1), and is, therefore, to be given the same construction which had been given those statutes. Smith v. North Memphis Savings Bank, supra.

As we have seen, the provision of 607 from its beginning down to the semi-colon after the words "his next of kin," is broad and comprehensive, and includes every case of the wrongful death of any woman, whether married or single, and whether survived by a husband or descendant, or only by her "next of kin" (e. g., a parent), and such right of action survives to her beneficiaries, whether they be husband, or descendants, or next of kin (parent).

This broad general provision is not modified or cut down by anything in any subsequent part of our wrongful death statute. Such subsequent parts (the last sentence of 607 and 610 and 611) are a compilation of the Acts of 1897 and 1953, which, as we have seen, apply only in the case of wrongful death of a married woman who left a surviving husband or children (or descendants), and not to a case where there was no surviving husband or descendant.

So, our conclusion is that the right of action for Mrs. Halstead's wrongful death, with no surviving husband or descendant, did not abate but passed to her "next of kin"; "or to his [her] personal representative for the benefit" of her "next of kin" (T. C. A. 20-607); that is, her father, respondent.

Third. Petitioner sought a directed verdict upon the two grounds above discussed and the further ground that there was no evidence to support the verdict—no evidence it was guilty of any negligence causing the death sued for. In considering this question, we must take the strongest legitimate view of the evidence to uphold the verdict—take as true all the evidence tending to support it and discard all countervailing evidence. Smith v. Sloan, 189 Tenn. 368, 376-377, 225 S. W. 2d 539, 227 S. W. 2d 2.

The evidence, so taken, tended to prove, and the jury could reasonably have found (as their general verdict implies they did), the following facts and circumstances making out the negligence charged in the declaration:—

As stated, petitioner, a common carrier of passengers by air, was operating an intra-state airline in Tennessee between Memphis and Tri-City and intermediate points. On January 8, 1959, Mr. and Mrs. Halstead, among others, were passengers on petitioner's DC-3 plane on its regular scheduled flight, Flight 308, from Memphis to Tri-City Airport. Its pilot Captain Bond, assisted by its First Officer Irvin, was in charge of the part of this flight from Memphis to Nashville, and from there on, its pilot Captain Gollmier and First Officer Irvin were in charge.

This plane was equipped with only one Automatic Direction Finder (ADF), which is a radio compass with a needle that can be seen and a device making a noise that can be heard, the needle automatically and continuously indicating the direction from the plane to the ground

radio facility to which the ADF is tuned, and the device identifying it by sound. When weather conditions prevent visual contact with the ground, and the plane must fly under Instrument Flight Rules (IFR), an ADF enables the pilot to know his locations and directions as he approaches an outer marker ground radio facility, and to know when he passes over such marker.

On Flight 308, as the plane approached Nashville, its ADF was not properly functioning; and it failed to "pick up" or identify the radio ground facility at the outer marker approach (near Linton some 20 miles west of Nashville), either aurally or visually. Captain Bond landed the plane at the Nashville Airport; and as he left it, he informed Captain Gollmier that the plane's ADF was "malfunctioning." The plane, nevertheless, was permitted to proceed on its flight to Knoxville and thence to Tri-City Airport.

Tri-City Airport was equipped with all the modern, up-to-date electronic devices and navigation and communication aids with which other airports are generally equipped. Often weather conditions are such that the pilot cannot see landmarks and the plane must make an instrument approach and landing. These devices at Tri-City Airport enable a plane, if its instruments are working properly, to make such a landing without difficulty or danger. Such landings have become more or less routine, not attended with undue risk, and are reasonably safe.

It appears that weather conditions at Tri-City Airport at the time in question were not unusual for that time of year. There was a north wind 10 to 15 m. p. h., "a ceiling of 900 feet broken, 1700 feet overcast, visibility three [miles], light snow, fog." While this condition prevented visual contact with the ground and made an instrument landing necessary, it does not appear that this was difficult or dangerous for a plane with its instruments prop-

erly working. In fact, within three or four minutes after Flight 308 was due to land there, a Piedmont plane landed there without any trouble.

As Flight 308 approached Tri-City Airport, its pilot, by radio, notified the control tower of its approach; and the tower operator acknowledged the message, gave the pilot information as to the weather, and advised him he was cleared to make an approach and come in and land on runway 27. The pilot next reported to the operator that he was descending from his elevation of 5,000 feet and was making an "outer marker" approach. This was at 8:24 P. M. The operator acknowledged the message and told the pilot to report when he was over the outer marker coming inbound, which was 3.7 miles from the airport, and he would be cleared to land.

Just at that time the tower operator received the message of the approach of the Piedmont plane. After a lapse of eight minutes from the receipt of the last message from the pilot of Flight 308, when the plane was due to be over the outer marker, the tower operator asked the pilot for his position and altitude. The pilot replied; "I am **having trouble with my ADF. I didn't pick up the outer marker, either aural or visual**" (emphasis ours). That was the last message. The plane flew on eastward some 20 miles beyond the airport, and crashed into the side of Holston Mountain.

As stated, this plane had only one ADF, and it was not working, or so the jury could reasonably have found. Without at least one ADF properly working, the plane was not airworthy, and should not have been permitted to leave the ground in Nashville. The proof was that most up-to-date aircraft now are equipped with two ADF's and that two on each plane are necessary to meet the highest skill of the art.

There were three methods of landing, and petitioner's pilot selected the outer marker approach, when either of the other methods would have been better. Under the regulations governing flying there, a plane making the outer marker approach is prohibited from flying more than five miles eastward beyond the airport. This is because of the presence of Holston Mountain, which is over 3,000 feet high. When this pilot failed to "pick up" the outer marker, he should have made an immediate "about face," and climbed to an altitude of at least 5,000 feet, flown west, and undertaken to make another approach.

A common carrier of passengers for hire is not an insurer of their safety, but owes them a duty of the highest degree of care consistent with the practical operation of the plane. The carrier must exercise such care not only in respect of the operation, but also of the equipment and maintenance of the plane. 6 Am. Jur., Aviation, section 51; Knoxville Cab Co. v. Miller, 176 Tenn. 88, 138 S. W. 2d 428. We find nothing to the contrary of this common law rule in the Federal Aviation Act of 1958. That Act recognizes that a duty rests upon air carriers "to perform their services with the highest possible degree of safety" (49 U. S. C. A., sec. 1421).

Upon the facts and circumstances of this case, we think the jury could reasonably have found that petitioner (defendant) breached its duty of care to its passengers aboard, and was guilty of negligence in respect of the condition of its plane and the manner of its operation, and such negligence caused the death sued for. So, we think, there was ample evidence to take the case to the jury and to support their verdict.

We also agree with the lower courts that the evidence herein made a jury case under the maxim *res ipsa loquitur*: where the thing causing the harm is shown to be under

the management of defendant (or its servants), and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of due care.

While there is a conflict of authorities, many well-considered decisions hold that in a case where the maxim *res ipsa loquitur* is applicable, a plaintiff does not lose the benefit of it by alleging specific acts of negligence which he fails to prove. Such is the rule in this State. Nashville Interurban Ry. Co. v. Gregory, 137 Tenn. 422, 433, 193 S. W. 1053.

It is true some of the older cases held that *res ipsa loquitur* did not apply to airplane accidents because they were then of common occurrence without negligence (see Towle v. Phillips, 180 Tenn. 121, 172 S. W. 2d 806). But, in the last decade or so, the progress of aviation has been such that it has now become an ordinary mode of transportation and is as safe or even safer than other modes so that now plane accidents do not happen in the ordinary course of things if those who have control use proper care.

Accordingly, courts now generally hold the maxim *res ipsa loquitur* applicable to such accidents. This matter was recently discussed by the Court of Appeals in a well-considered opinion by Judge Howard, in the case of Capital Airlines, Inc. v. Frances S. Barger, Admx., 47 Tenn. App. 636, 643-650, 341 S. W. 2d 579, ... This Court denied certiorari; and we think it contains a correct statement of the law in this State in airplane accident cases; and that the maxim *res ipsa loquitur* there applied, applies equally in the case before us.

Petitioner, however, contends that the doctrine of *res ipsa loquitur* should not apply to this case because its

servants and agents did not have exclusive control of the plane but were under the direction of the Aviation Agency operating the control tower at Tri-City Airport and giving petitioner's pilot instructions as to clearance and landing, etc.

We think there is no merit to this contention. These Aviation Agency employees operating the control tower were merely giving instructions and affording aid to the pilot in making an approach and landing. They were not in control of the plane. Petitioner's employees had exclusive physical control of it. In Lobel v. American Airlines, Inc., 192 Fed. 2d 217, the Court rejected a contention similar to that now made by petitioner. There, Circuit Judge Jerome N. Frank said:

> "We pay little heed to defendant's claim that it did not have exclusive control of the plane because Air-Traffic-Control regulations governed the height at which it had to travel. It is enough that defendant had complete physical control of the mechanism, even to the point of disregarding regulations for the immediate safety of its passengers."

Fourth. Petitioner insists that the verdict is so grossly excessive as to evince passion, prejudice and caprice on the part of the jury; that the Court of Appeals erred in holding the verdict was not excessive; and that we should hold such verdict excessive and either reverse the judgment and grant a new trial or require a substantial remittitur as a condition for refusing such new trial.

It appears that the Trial Judge, after fully considering the question of the amount of the verdict, approved it and entered judgment thereon. The Court of Appeals, likewise, fully considered the question, discussed the elements which, in its opinion, justified the amount allowed, and fully concurred with the Trial Court as to the amount of

damages to be allowed. There is no contention that the verdict was illegal or corrupt.

In the absence of a corrupt verdict, the concurrence of the Trial Court and the Court of Appeals as to the amount of damages, if supported by any material evidence, will not be disturbed by this Court. Lambert Bros., Inc., v. Larkins, 200 Tenn. 674, 296 S. W. 2d 353.

There was material evidence to support the verdict for $145,000.00 compensatory damages. But, we think, there was no evidence to support any allowance of punitive damages, no evidence that petitioner was guilty of such gross and wanton negligence as to justify any award for punitive damages.

The rule in this State is that punitive or exemplary damages is allowable for negligence only where such negligence is so gross and wanton as to "raise a presumption of conscious indifference to consequences." Railway Co. v. Lee, 90 Tenn. 570, 18 S. W. 268; Consolidated Coach Co., Inc., v. McCord, 171 Tenn. 253, 258, 102 S. W. 2d 53; Inter-City Trucking Co. v. Daniels, 181 Tenn. 126, 130, 178 S. W. 2d 756.

> "Exemplary damages are only allowed where a wrongful act is done with a bad motive, or so recklessly as to imply a disregard of social obligations, or where there is negligence so gross as to amount to positive misconduct. 11 Lea, 103." Railway Co. v. Lee, supra.

We find no evidence of any such negligence in this case. While petitioner's (defendant's) pilot and First Officer were negligent in undertaking to fly a plane not airworthy, and in their manner of operation of the plane, there is nothing to show such gross and wanton negligence on their part as to evince conscious indifference to conse-

quences. It must be remembered that their own lives were at stake, and they evidently expected to make a safe landing.

Since there is no basis in the evidence to support the item of $5,000.00 for punitive damages, that amount will be disallowed. If plaintiff will remit the sum of $5,000.00, the judgment of the Court of Appeals in the sum of $145,000.00 will be affirmed and a judgment will be entered for plaintiff against defendant in the sum of $145,000.00, with interest on that sum from the date of the overruling of the motion for a new trial (Monday v. Millsaps, 197 Tenn. 295, 271 S. W. 2d 857; Capital Airlines, Inc. v. Barger, supra, 47 Tenn. App. 655). Otherwise, the judgment will be reversed and the case will be remanded for a new trial.

Petitioner has raised a number of other matters by its assignments of error. We have carefully considered all of such matters and find no merit in any of them. We think they do not require further discussion. We are satisfied with the disposition of them made by the Court of Appeals. All of petitioner's assignments of error are overruled and the judgment of the Court of Appeals will be affirmed upon the condition above stated. The costs of the appeal in error are adjudged against petitioner and the surety on its appeal bond.

S. L. Felts,
Justice.

Southeastern Aviation, Inc., d/b/a Southeast Airlines,
Petitioner,

v.

A. H. Hurd, Individually and as Administrator of Phyllis Eloise Hurd Halstead, Deceased,
Respondent.

JUDGMENT OF SUPREME COURT OF TENNESSEE.

Entered March 9, 1962.

Southeastern Aviation, Inc., d/b/a Southeast Airlines,
Petitioner,
vs.
A. H. Hurd, Individually and as Administrator of the Estate of Phyllis Eloise Hurd Halstead, Deceased,
Respondent.
} Sullivan Law.

Final Judgment.

This case came on to be heard before the Supreme Court of Tennessee, at Knoxville, upon the petition, filed by Southeastern Aviation, Inc., d/b/a Southeast Airlines, for a writ of certiorari to review the final judgment of the Court of Appeals of Tennessee, Eastern Division, which petition for said writ has heretofore been granted by this Court, and upon a transcript of the record from the Court of Appeals of Tennessee, Eastern Division, assignments of error, brief in support thereof, and a reply brief by respondent, and after argument of counsel, upon consideration whereof the Court is of the opinion that if respondent, A. H. Hurd, indiyidually and as Administrator of the Estate of Phyllis Eloise Hurd Halstead, deceased, will remit the sum of $5,000.00 for punitive damages, the judgment of the Court of Appeals in the sum of $145,000.00 will be affirmed and a judgment will be entered for said respondent against petitioner in the sum of $145,000.00 with interest on that sum from the date of the overruling of the motion for a new trial in this case, and unless respondent will remit said sum of $5,000.00, the judgment of the Court of Appeals will be reversed and the case will be remanded for a new trial.

Thereupon, came respondent, A. H. Hurd, by his attorneys, and represented to the Court that respondent will

remit the sum of $5,000.00 for punitive damages so that the judgment of the Court of Appeals in the sum of $145,000.00 will be affirmed and a judgment will be entered for respondent against petitioner in the sum of $145,000.00.

It is, therefore, Ordered, Adjudged and Decreed by the Court that the respondent, A. H. Hurd individually and as Administrator of the Estate of Phyllis Eloise Hurd Halstead, deceased, have and recover of the petitioner, Southeastern Aviation, Inc., d/b/a Southeast Airlines, the sum of One Hundred Forty-Five Thousand Dollars ($145,000.00) with interest on that sum from January 9, 1960, that being the date of the overruling of the motion for a new trial by the trial court, together with all costs of the cause, for which let execution issue.

A lien is hereby declared and allowed Preston H. Taylor and Wilson, Worley & Gamble, attorneys of record for respondent, for their reasonable attorneys' fees on the above recoveries.

This March 9, 1962.

(Signed) Alan M. Prewitt, C. J.,
Ross W. Dyer, J.,
Hamilton S. Burnett, J.

A. H. Hurd, Individually and as
Administrator of the Estate of
Phyllis Eloise Hurd Halstead,
Deceased,

By: Preston H. Taylor,
Wilson, Worley & Gamble,

By: H. E. Wilson,
Attorneys for Respondent.

Section 42-106 of Tennessee Code Annotated reads as follows:

> "**Rules of law of jurisdiction determining liability of owners.** The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damages caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land."

Section 42-107 of Tennessee Code Annotated reads as follows:

> "**Laws of this state govern as to wrongs and damages.** All crimes, torts, and other wrongs committed by or against an aeronaut or passenger while in flight over this state, shall be governed by the laws of this state; and the question whether damage occasioned by or to an aircraft while in flight over this state constitutes a tort, crime, or other wrong by or against the owner of such aircraft, shall be determined by the laws of this state."

ARTICLE I, SECTION 8, CLAUSE 3
AND
PARAGRAPH (2) OF ARTICLE 6
OF THE CONSTITUTION OF THE UNITED STATES

Article I, Section 8, Clause 3 of the Constitution of the United States reads as follows:

"The Congress shall have power . . .

(3) To regulate commerce with foreign nations, and among the several states. . . .

Paragraph (2) Article 6 of the Constitution of the United States reads as follows:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

PERTINENT PORTIONS OF FEDERAL AVIATION ACT OF 1958.

Public Law 85-726; 72 Stat. 731.

49 U. S. C., Section 1301 et seq.

Federal Aviation Act of 1958.

Public Law 85-726; 72 Stat. 731.

An act to continue the Civil Aeronautics Board as an agency of the United States, to create a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

This Act, divided into titles and sections according to the following table of contents, may be cited as the "Federal Aviation Act of 1958":

This Act is found in 49 U. S. C., Section 1301 et. seq., and the pertinent parts thereof read as follows:

§ 1301. Definitions.

As used in this chapter, unless the context otherwise requires—

(1) "Administrator" means the Administrator of the Federal Aviation Agency.

(2) "Aeronautics" means the science and art of flight.

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: Provided, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

(4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft, or any operation or navigation or aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

(5) "Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.

(6) "Aircraft engine" means an engine used, or intended to be used, for propulsion of aircraft and includes all parts, appurtenances, and accessories thereof other than propellers.

(7) "Airman" means any individual who engages, as the person in command or as pilot, mechanic, or member of the crew, in the navigation of aircraft while under way; and (except to the extent the Administrator may otherwise provide with respect to individuals employed outside the United States) any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft, aircraft engines, propellers, or appliances; and any individual who serves in the capacity of aircraft dispatcher or air-traffic control-tower operator.

(8) "Air navigation facility" means any facility used in, available for use in, or designed for use in, aid of air navigation, including landing areas, lights, any apparatus or equipment for disseminating weather information, for signaling, for radio-directional finding, or for radio or other electrical communication, and any other structure or mechanism having a similar purpose for guiding or controlling flight in the air or the landing and takeoff of aircraft.

(9) "Airport" means a landing area used regularly by aircraft for receiving or discharging passengers or cargo.

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

(11) "Appliances" means instruments, equipment, apparatus, parts, appurtenances, or accessories, of whatever description, which are used, or are capable of being or intended to be used, in the navigation, operation, or control of aircraft in flight (including parachutes and including communication equipment and any other mechanism or mechanisms installed in or attached to aircraft during flight), and which are not a part or parts of aircraft, aircraft engines, or propellers.

(12) "Board" means the Civil Aeronautics Board.

(13) "Citizen of the United States" means (a) an individual who is a citizen of the United States or of one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.

(14) "Civil aircraft" means any aircraft other than a public aircraft.

(15) "Civil aircraft of the United States" means any aircraft registered as provided in this chapter.

(16) "Conditional sale" means (a) any contract for the sale of an aircraft, aircraft engine, propeller, appliance, or spare part under which possession is delivered to the buyer and the property is to vest in the buyer at a subsequent time, upon the payment of part or all of the price,

or upon the performance of any other condition or the happening of any contingency; or (b) any contract for the bailment or leasing of an aircraft, aircraft engine, propeller, appliance, or spare part, by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value thereof, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner thereof upon full compliance with the terms of the contract. The buyer, bailee, or lessee shall be deemed to be the person by whom any such contract is made or given.

(17) "Conveyance" means a bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or other instrument affecting title to, or interest in, property.

(18) "Federal airway" means a portion of the navigable airspace of the United States designated by the Administrator as a Federal airway.

(19) "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in foreign air transportation.

(20) "Interstate air commerce", "overseas air commerce", and "foreign air commerce", respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Terri-

tory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(22) "Landing area" means any locality, either of land or water, including airports and intermediate landing fields, which is used, or intended to be used, for the landing and take-off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo.

(23) "Mail" means United States mail and foreign transit mail.

(24) "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft.

(25) "Navigation of aircraft" or "nagivate aircraft" includes the piloting of aircraft.

(26) "Operation of aircraft" or "operate aircraft" means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter.

(27) "Person" means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

(28) "Propeller" includes all parts, appurtenances, and accessories thereof.

(29) "Possessions of the United States" means (a) the Canal Zone, but nothing herein shall impair or affect the

jurisdiction which has heretofore been, or may hereafter be, granted to the President in respect of air navigation in the Canal Zone, and (b) all other possessions of the United States. Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, references in this chapter to possessions of the United States shall be treated as also referring to the Commonwealth of Puerto Rico.

(30) "Public aircraft" means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any State, Territory, or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes.

(31) "Spare parts" means parts, appurtenances, and accessories of aircraft (other than aircraft engines and propellers), of aircraft engines (other than propellers), of propellers and of appliances, maintained for installation or use in an aircraft, aircraft engine, propeller, or appliance, but which at the time are not installed therein or attached thereto.

(32) "Ticket agent" means any person, not an air carrier or a foreign air carrier and not a bona fide employee of an air carrier or foreign air carrier, who, as principal or agent, sells or offers for sale any air transportation, or negotiates for, or holds himself out by solicitation, advertisement, or otherwise, as one who sells, provides, furnishes, contracts or arranges for such transportation.

(33) "United States" means the several States, the District of Columbia, and the several Territories and possessions of the United States, including the territorial waters and the overlying airspace thereof. Pub. L. 85-726, Title I, § 101, Aug. 23, 1958, 72 Stat. 737.

§ 1302. Consideration of matters in public interest by Board.

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics. Pub. L. 85-726, Title I, § 102, Aug. 23, 1958, 72 Stat. 740.

§ 1303. Consideration of matters in public interest by Administrator.

In the exercise and performance of his powers and duties under this chapter the Administrator shall consider the following, among other things, as being in the public interest:

(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;

(b) The promotion, encouragement, and development of civil aeronautics;

(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both;

(d) The consolidation of research and development with respect to air navigation facilities, as well as the installation and operation thereof;

(e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft. Pub. L. 85-726, Title I, § 103, Aug. 23, 1958, 72 Stat. 740.

§ 1304. Public right of transit.

There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States. Pub. L. 85-726, Title I, § 104, Aug. 23, 1958, 72 Stat. 740.

§ 1341. Federal Aviation Agency—Establishment; Administrator; appointment; compensation; powers and duties.

(a) There is established the Federal Aviation Agency, referred to in this chapter as the "Agency". The Agency shall be headed by an Administrator who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall receive compensation at the rate of $22,500 per annum. The Administrator shall be responsible for the exercise of all powers and the discharge of all duties of the Agency, and shall have authority and control over all personnel and activities thereof. In the exercise of his duties and the discharge of his responsibilities under this chapter, the Administrator shall not submit his decisions for the approval of, nor be bound by the decisions or recommendations of, any committee, board, or other organization created by Executive order.

§ 1347. National defense and civil needs.

In exercising the authority granted in, and discharging the duties imposed by, this chapter, the Administrator shall give full consideration to the requirements of national defense, and of commercial and general aviation, and to the public right of freedom of transit through the navigable airspace. Pub. L. 85-726, Title III, § 306, Aug. 23, 1958, 72 Stat. 749.

§ 1348. Airspace control and facilities—Use of airspace.

(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

Air navigation facilities.

(b) The Administrator is authorized, within the limits of available appropriations made by the Congress, (1) to acquire, establish, and improve air-navigation facilities wherever necessary; (2) to operate and maintain such air-navigation facilities; (3) to arrange for publication of aeronautical maps and charts necessary for the safe and efficient movement of aircraft in air navigation utilizing the facilities and assistance of existing agencies of the Government so far as practicable; and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic.

Air traffic rules.

(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

Applicability of Administrative Procedure Act.

(d) In the exercise of the rulemaking authority under subsections (a) and (c) of this section, the Administrator shall be subject to the provisions of the Administrative Procedure Act, notwithstanding any exception relating to military or naval functions in section 1003 of Title 5.

Exemptions.

(e) The Administrator from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this subchapter if he finds that such action would be in the public interest.

Exception for military emergencies.

"(f) When it is essential to the defense of the United States because of a military emergency or urgent military necessity, and when appropriate military authority so determines, and when prior notice thereof is given to the Administrator, such military authority may authorize deviation by military aircraft of the national defense forces of the United States from air traffic rules issued pursuant to this subchapter. Such prior notice shall be given to the Administrator at the earliest time practicable and, to the extent time and circumstances permit, every reasonable effort shall be made to consult fully with the Administrator and to arrange in advance for the required deviation from the rules on a mutually acceptable basis. Pub. L. 85-726, Title III, § 307, Aug. 23, 1958, 72 Stat. 749.

§ 1350. Establishment or construction of airports and landing areas not involving expenditure of Federal funds.

In order to assure conformity to plans and policies for, and allocations of, airspace by the Administrator under section 1348 of this title, no airport or landing area not involving expenditure of Federal funds shall be established, or constructed, or any runway layout substantially altered unless reasonable prior notice thereof is given the Administrator, pursuant to regulations prescribed by him, so that he may advise as to the effects of such construction on the use of airspace by aircraft. Pub. L. 85-726, Title III, § 309, Aug. 23, 1958, 72 Stat. 751.

§ 1353. Development planning—Use of navigable airspace; location of landing areas, Federal airways, radar installations, and air navigation facilities.

(a) The Administrator is directed to make long-range plans for and formulate policy with respect to the orderly development and use of the navigable airspace, and the

orderly development and location of landing areas, Federal airways, radar installations and all other aids and facilities for air navigation, as will best meet the needs of, and serve the interest of civil aeronautics and national defense, except for those needs of military agencies which are peculiar to air warfare and primarily of military concern.

Aircraft, aircraft engines, propellers and appliances.

(b) The Administrator is empowered to undertake or supervise such developmental work and service testing as tends to the creation of improved aircraft, aircraft engines, propellers and appliances. For such purpose, the Administrator is empowered to make purchases (including exchange) by negotiation, or otherwise, of experimental aircraft, aircraft engines, propellers, and appliances, which seem to offer special advantages to aeronautics.

Research and development.

(c) The Administrator shall develop, modify, test and evaluate systems, procedures, facilities, and devices, as well as define the performance characteristics thereof, to meet the needs for safe and efficient navigation and traffic control of all civil and military aviation except for those needs of military agencies which are peculiar to air warfare and primarily of military concern, and select such systems, procedures, facilities, and devices as will best serve such needs and will promote maximum coordination of air traffic control and air defense systems. Contracts may be entered into for this purpose without regard to section 529 of Title 31. When there is any substantial question as to whether a matter is of primary concern to the military, the Administrator is authorized and directed to determine whether he or the appropriate military agency shall have responsibility. Technical information concerning any research and development projects of the military agencies which have potential application to the needs of,

or possible conflict with, the common system shall be furnished to the Administrator to the maximum extent necessary to insure that common system application potential is properly considered and potential future conflicts with the common system are eliminated. Pub. L. 85-726, Title III, § 312, Aug. 23, 1958, 72 Stat. 752.

SUBCHAPTER IV. AIR CARRIER ECONOMIC REGULATION.

§ 1371. Certificate of public convenience and necessity—Essentiality.

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Terms, conditions, and limitations.

(e) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing

the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency under regulations which may be prescribed by the Board, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board.

Alteration, amendment, modification, suspension, or revocation.

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this subchapter or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: Provided, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

Transfer.

(b) No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest.

§ 1386. Classification and exemption of carriers.

(a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this subchapter as the nature of the services performed by such air carriers shall require; and such just and reasonable rules and regulations, pursuant to and consistent with the provisions of this subchapter, to be observed by each such class or group, as the Board finds necessary in the public interest.

SUBCHAPTER VI. SAFETY REGULATION OF CIVIL AERONAUTICS.

§ 1421. Powers and duties of Administrator—Minimum standards; rules and regulations.

(a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment

and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Administrator, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Administrator may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

§ 1424. Air carrier operating certificates; authorization to issue; minimum safety standards; application; issuance.

(a) The Administrator is empowered to issue air carrier operating certificates and to establish minimum safety standards for the operation of the air carrier to whom any such certificate is issued.

§ 1425. Maintenance of equipment in air transportation; duty of carriers and airmen; inspection of aircraft and equipment.

(a) It shall be the duty of each air carrier to make, or cause to be made, such inspection, maintenance, overhaul,

and repair of all equipment used in air transportation as may be required by this chapter, or the orders, rules, and regulations of the Administrator issued thereunder. And it shall be the duty of every person engaged in operating, inspecting, maintaining, or overhauling equipment to observe and comply with the requirements of this chapter relating thereto, and the orders, rules, and regulations issued thereunder.

§ 1430. Violations; exemptions of foreign aircraft and airmen.

(a) It shall be unlawful—

(1) For any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate, or in violation of the terms of any such certificate;

(2) For any person to serve in any capacity as an airman in connection with any civil aircraft, aircraft engine, propeller or appliance used or intended for use, in air commerce without an airman certificate authorizing him to serve in such capacity, or in violation of any term, condition, or limitation thereof, or in violation of any order, rule, or regulation issued under this subchapter;

(3) For any person to employ for service in connection with any civil aircraft used in air commerce an airman who does not have an airman certificate authorizing him to serve in the capacity for which he is employed;

(4) For any person to operate as an air carrier without an air carrier operating certificate, or in violation of the terms of any such certificate;

(5) For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificate of the Administrator under this subchapter; and

(6) For any person to operate a seaplane or other aircraft of United States registry upon the high seas in contravention of the regulations proclaimed by the President pursuant to section 143 of Title 33; and

(7) For any person holding an air agency or production certificate, to violate any term, condition, or limitation thereof, or to violate any order, rule, or regulation under this subchapter relating to the holder of such certificate.

§ 1506. Remedies not exclusive.

Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies. Pub. L. 85-726, Title XI, § 1106, Aug. 23, 1958, 72 Stat. 798.

§ 1508. Declaration of national sovereignty in air space; operation of foreign aircraft.

(a) The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Aircraft of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.

PERTINENT PORTIONS OF CIVIL AIR REGULATIONS OF THE FEDERAL AVIATION AGENCY.

14 CFR, Page 130 et Seq.

Section 40.10 **Certificate required.**

No person subject to the provision of this part shall operate an airplane in scheduled interstate air transportation without, or in violation of the terms of, an air carrier operating certificate issued by the Administrator.

. . . . . .

Section 40.17 **Transferability of certificate.**

An air carrier operating certificate is not transferable, except with the written consent of the Administrator.

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Section 40.18 **Operations specifications required.**

(a) No person subject to the provisions of this part shall operate as an air carrier without, or in violation of, operations specifications issued by the Administrator.

. . . . . .

Section 40.30 **Route requirements; demonstration of competence.**

The air carrier shall show that it is competent to conduct scheduled operations over any route or route segment between any regular, provisional, or refueling airport and that the facilities and services available are adequate for the type of operation proposed. The Administrator shall not require actual flight over a route or route segment, if the air carrier shows that such flight is not essential to safety. The air carrier may thereafter conduct operations between regular, provisional, or refueling airports on any approved route or routes on which the operational facilities and procedures are substantially similar: Provided, That high-altitude operations may be conducted over any route.

. . . . . .

Section 40.37 **Servicing and maintenance facilities.**

The air carrier shall show that competent personnel and adequate facilities and equipment, including spare parts, supplies, and materials, are available at such points along the air carrier's routes as are necessary for the proper servicing, maintenance, repair, and inspection of airplanes and auxiliary equipment.

Section 40.50 **Preparation of manual.**

The air carrier shall prepare and keep current a manual for the use and guidance of flight and ground operations personnel in the conduct of its operations.

Section 40.60 **General.**

Airplanes shall be identified, certificated, and equipped in accordance with the applicable airworthiness requirements of the regulations in this subchapter. No air carrier shall operate any airplane in scheduled operation unless such airplane meets the requirements of this part and is in an airworthy condition.

Section 40.70 **Transport category airplane operating limitations.**

(a) In operating any passenger-carrying transport category airplane the provisions of Sections 40.71 through 40.78 shall be complied with, unless deviations therefrom are specifically authorized by the Administrator on the ground that the special circumstances of a particular case make a literal observance of the requirements unnecessary for safety.

(b) For transport category airplanes the performance data contained in the Airplane Flight Manual shall be

applied in determining compliance with these provisions. Where conditions differ from those for which specific tests were made, compliance shall be determined by interpolation or by computation of the effects of changes in the specific variables where such interpolations or computations will give results substantially equalling in accuracy the results of a direct test.

. . . . . .

Section 40.230 **Radio equipment.**

Each airplane used in scheduled air transportation shall be equipped with radio equipment specified for the type of operation in which it is engaged. Where two independent radio systems are required by Sections 40.231 and 40.232, each system shall have an independent antenna installation: Provided, That where rigidly supported non-wire antennas or other antenna installations of equivalent reliability are used, only one such antenna need be provided.

. . . . . .

Section 40.232 **Radio equipment for operations under VFR over routes not navigated by pilotage or for operations under IFR or over-the-top.**

(b) In the case of operation on routes using procedures based on automatic direction finding, only one automatic direction finding system need be installed: Provided, That ground facilities are so located and the airplane is so fueled that, in case of failure of the automatic direction finding equipment, the flight may proceed safely to a suitable airport which has ground radio navigational facilities whose signals may be received by the use of the remaining airplane radio systems.

. . . . . .

Section 40.280 **Training requirements.**

(a) Each air carrier shall establish a training program sufficient to insure that each crew member and dispatcher used by the air carrier is adequately trained to perform the duties to which he is to be assigned. The initial training phases shall be satisfactorily completed prior to serving in scheduled operations.

Section 40.320 **Flight time limitations.**

(a) An air carrier shall not schedule any flight crew member for duty aloft in scheduled air transportation or in other commercial flying if his total flight time in all commercial flying will exceed the following flight time limitations:

Section 45.3 **Certification requirements.**

A commercial operator certificate shall be issued to an applicant who demonstrates to the Administrator that he is capable of conducting his operations in accordance with the provisions of Part 42 of this subchapter, as heretofore or hereafter amended, or at an equivalent level of safety: Provided, That an applicant who carries or intends to carry passengers for compensation or hire as a common carrier between two points[2] entirely within any State with the frequency set forth in paragraph (a) of this section shall demonstrate that he is capable of conducting these operations in accordance with the requirements of Part 40 of this subchapter, as heretofore or hereafter amended, except Sections 40.1, 40.10, and 40.12 through 40.17, or with such other certification requirements as the Adminis-

[2] The term "point" as used in this section shall have the same meaning as that established by Section 291.1 (b) of this chapter. Section 291.1 (b) defines point to include "any airport or place where aircraft may be landed or taken off, including the area within a 25-mile radius of such airport or place."

trator finds will provide an a
for the operation.

(a) Two flights, or one roun
day or days of the week for a
any 90 consecutive days; or a
or 18 or more round trips, in a

. . . . .

Section 45.4 **Operating rules.**

(b) Persons subject to the p
conduct common carrier operat
craft of more than 12,500 pou
take-off weight carrying passe
tirely within a State with the f
tion 45.3 (a) shall, in the cond
ations between such points, con
of Part 40 of this subchapter,
amended, except Sections 40.1,
40.17, or with such other oper
Administrator finds will provid
safety for the operation.

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l trip, a week on the same
ny eight or more weeks in
total of 36 or more flights,
y 90 consecutive days.

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No. 286

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

SOUTHEASTERN AVIATION, INC.,
d/b/a SOUTHEAST AIRLINES,
Appellant,

vs.

A. H. HURD, Individually and as Administrator of the Estate of Phyllis Eloise Hurd Halstead, Deceased,
Appellee.

On Appeal from the Supreme Court of Tennessee.

MOTION TO DISMISS APPEAL WITH BRIEF IN SUPPORT THEREOF.

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Appellee.

On Appeal from the Supreme Court of Tennessee.

MOTION TO DISMISS APPEAL

The Appellee respectfully moves the Court to dismiss the appeal herein upon the following grounds:

1. This appeal is not within the jurisdiction of this Court because not taken in conformity to statute.

2. This appeal does not present a substantial federal question.

3. The federal question as to the constitutionality of Sections 42-106 and 42-107 of Tennessee Code Annotated

sought to be reviewed, was not timely or properly raised, and was not expressly passed on.

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Appellee.

On Appeal from the Supreme Court of Tennessee.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

JURISDICTION.

On March 8, 1962, a final judgment was entered by the Supreme Court of Tennessee against the appellant and in favor of the appellee for damages for the wrongful death of appellee's intestate who was killed in an airplane crash that occurred in Tennessee on January 8, 1959. On and

prior to the date of this crash, appellant was an intrastate air carrier, with its operations confined to the State of Tennessee. The aforesaid judgment of the Supreme Court of Tennessee is based upon a finding that appellant was guilty of negligence under the common law of Tennessee which proximately caused the wrongful death of appellee's intestate who was a fare paying passenger on one of appellant's intrastate flights.

Appellant has appealed to this Court, and asserts, in its Jurisdictional Statement, that the jurisdiction of this Court to review this judgment of the Tennessee Supreme Court "by direct appeal is conferred by Title 28, U.S.C. § 1257 (2)". (See Jurisdictional Statement, page 3).

Title 28 U.S.C. § 1257 (2) provides as follows:

> "Final judgments or decrees rendered by the highest Court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Appellant apparently predicates its right to appeal to this Court on the ground that the Tennessee Supreme Court held that Sections 42-106 and 42-107 of Tennessee Code Annotated were valid under the Federal Constitution, (See Jurisdictional Statement, page 12; and Appendix, page 28a). These two sections of the Tennessee Code are the only Tennessee statutes referred to by appellant.

No reference is made in the opinion of the Supreme Court of Tennessee or in the judgment based thereon to Sections 42-106 and 42-107 of Tennessee Code Annotated. These Tennessee statutes were not relied on by the appellee

in support of this action, and were never specifically referred to by the parties or the Tennessee Courts. It is clear, we submit, from the opinion of the Supreme Court of Tennessee, (Appendix to Jurisdictional Statement, Page 4a-8a), that the federal constitutionality of these two Tennessee statutes has never been drawn in question and has not been passed upon by that court.

Since the federal constitutionality of these two statutes of Tennessee was never "drawn in question" or passed upon in the state courts of Tennessee, we respectfully submit that this Court lacks jurisdiction of this appeal under 28 U.S.C. § 1257 (2).

Appellee's contention that this Court lacks jurisdiction under 28 U.S.C. § 1257 (2) of cases in which the federal constitutionality of a state statute was never "drawn in question" or passed upon in the state courts is supported by the following cases:

Anonymous v. Baker, 360 US 287, 3 L ed 2d 1234, 79 S Ct 1157; and **Rohr Aircraft Corp. v. County of San Diego,** 362 US 628, 4 L ed 1002, 80 S Ct 1050.

QUESTIONS PRESENTED.

Appellee respectfully submits that the following is a statement of the only question presented by this appeal:

HAS THE FEDERAL AVIATION ACT OF 1958 OCCUPIED THE AVIATION FIELD SO COMPLETELY THAT, BY IMPLICATION, THE STATE COURTS ARE EXCLUDED FROM ENTERTAINING ACTIONS TO RECOVER DAMAGES FOR THE WRONGFUL DEATH OF A PASSENGER KILLED IN AN AIRPLANE CRASH PROXIMATELY CAUSED BY AN INTRASTATE AIR CARRIER'S NEGLIGENCE AS DETERMINED BY THE COMMON LAW OF THE STATE IN WHICH THE TORT OCCURRED?

STATEMENT.

Appellee desires to correct certain omissions in the Statement made by Appellant in its Jurisdictional Statement.

Appellant asserts that "—the Supreme Court of Tennessee held that the Federal Aviation Act of 1958 did not pre-empt the field—" and "—that the general scheme of regulation of the air space and the operation of aircraft therein as set forth in the Federal Aviation Act has left room for each state to provide rules, regulations and standards which will govern within the respective states the operation of aircraft, provided the state rules and regulations are not inconsistent with the purpose of the Federal Act." (See Jurisdictional Statement, pp.11-12).

We cannot agree with this statement by appellant. The Supreme Court of Tennessee expressly held that the purpose of the Federal Aviation Act was to take control of the air space of the United States, and also to provide for the establishment of rules, regulations and minimum standards to promote the efficiency and safety of air navigation. (See Opinion of Supreme Court of Tennessee, Appendix to Jurisdictional Statement, page 5a).

Appellant's jurisdictional Statement (pp. 10-11) also contains only a partial quotation of the Tennessee Supreme Court's opinion dealing with the question of whether or not the Federal Aviation Act of 1958 pre-empted the field so that state courts have no jurisdiction to try wrongful death actions growing out of airplane crashes. Appellant's quotation fails to show the omission of some six paragraphs of the Court's opinion between the first sentence and the remaining sentences of the last quoted paragraph of the Tennessee Supreme Court Opinion as set forth on page 11 of appellant's Jurisdictional Statement. The omitted por-

tions of the Tennessee Supreme Court's Opinion begin with the second sentence of the following quotation:

"It seems clear this Act does not exclude state law not inconsistent with its purpose. Its language above quoted (sec. 1508 (a) is the same as that of the Civil Aeronautics Act of 1938, 49 U.S.C.A., section 176 (a), which was held not to exclude consistent state law—a law of Nebraska taxing aircraft used interstate in landing on and departing from airports within that state. Braniff Airways v. Nebraska State Board, 347 U.S. 590, 98 L. Ed. 970.

"There, the Court said that 'these Federal Acts (the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938) are bottomed on the commerce power of Congress, not on national ownership of the navigable airspace, as distinguished from sovereignty', and that federal power over navigable airspace, like federal power over navigable streams, 'does not prevent state action consistent with that power.' To the same effect: Huron Portland Cement Co. v. Detroit (1960), 362 U.S. 440, 4 L. Ed. 2d 852.

"The conclusion that the Federal Aviation Act of 1958 does not exclude consistent state law, or alter existing remedies under state law, seems to be strengthened by the words of the savings clause of that Act (U.S.C.A., sec. 1506), which are as follows: 'Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.'

"The Court of Appeals put its decision upon this savings clause, citing Erie R. Co. v. Tompkins, 82 L. Ed. 1188, 304 U.S. 64, 114 A.L.R. 1487, to the effect that 'there is no federal general common law', and holding

that this saving of 'the remedies now existing at common law or by statute' refers to the common law and statutes of the several states. Learned counsel for petitioner insists that this reference is not to state law, but to federal law. We think this argument is unsound. Porter v. Southeastern Aviation, Inc. (1961), 191 Fed. Supp. 42, 43.

"The language of this savings clause, above quoted, is the same as that of the Interstate Commerce Act (49 U.S.C.A., sec. 22), which has been held to refer to the remedies under the common law and statutes of the several states and to preserve their 'general and concurrent jurisdiction' in suits for damages against an interstate carrier. Pennsylvania R. Co. v. Puritan Coal Mining Co., 237 U.S. 121, 130, 59 L. Ed. 867, 872; Pennsylvania R. Co. v. Sonman S.C. Co., 242 U.S. 120, 61 L. Ed. 188; Central New England Ry. Co. v. Boston & Albany R. Corp., 279 U.S. 415, 420, 73 L. Ed. 770, 775.

"The Federal Aviation Act of 1958 appears to be merely an administrative measure, limited to the regulation of the operation of aircraft in the interest of public safety. It does not touch the traditional area of the law of torts or private right, and does not give any remedy for an injury to such right, such as an injury to the person of a passenger caused by an air carrier's negligence in the operation of its plane.

"Petitioner likens this Act to the Labor Management Relations Act which pre-empts the field and excludes state law in labor disputes. But since the latter affords no remedy for recovery of damages caused by a tort, state courts have jurisdiction in such a case to award damages according to 'its traditional low of torts.' United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656, 98 L. Ed. 1025; Int. Union, U.A.A. & A.I.W. v. Russell, 356 U.S. 634, 2 L. Ed. 2d 1030; cf. San

Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-244, 3 L. Ed. 2d 775, 782, with Charles Dowd Box Co., Inc. v. John F. Courtney et al (Feb. 19, 1962), U.S. L. Ed. 2d ."

The Supreme Court of Tennessee, after referring to the fact that appellee's declaration "charged common law negligence", and was "a suit in tort upon a right created by the law of the state", (See appellant's Appendix, page 7a), also said:

"Nor did it (appellee's declaration) lose its character as an action for negligence under state law because it also averred a violation of regulations of the Civil Aeronautics Board. Such averment merely added another ground of negligence for recovery; it did not raise an issue of federal law or invoke a federal right which would be supported if such law were given one construction or effect and defeated if given another. Dennis v. Southeastern Aviation, Inc., 176 Fed. Supp. 542, 543; Pan American P. Corp. v. Superior Court, U.S. , 6 L. Ed. 2d 584, 589-591, and cases there cited.

"It was for this reason that this case was held not removable, not being a case under Constitution or the laws of the United States, or of diversity of citizenship. The same conclusion was reached by the United States District Courts in two other similar cases growing out of the same accident. Dennis v. Southeastern Aviation, Inc., supra, 176 Fed. Supp. 542; Porter v. Southeastern Aviation, Inc., supra, 191 Fed. Supp. 42."

The Supreme Court of Tennessee (see appellant's Appendix, page 19a) also held:

"A common carrier of passengers for hire is not an insurer of their safety, but owes them a duty of the highest degree of care consistent with the practical

operation of the plane. The carrier must exercise such care not only in respect of the operation, but also of the equipment and maintenance of the plane. 6 Am. Jur., Aviation, section 51; Knoxville Cab Co. v. Miller, 176 Tenn. 88, 138 S.W. 2d 428. We find nothing to the contrary of this common law rule in the Federal Aviation Act of 1958. That Act recognizes that a duty rests upon air carriers 'to perform their services with the highest possible degree of safety' (49 U.S.C.A. sec. 1421)."

We also respectfully disagree with appellant's contention that "there is a direct conflict between the laws of Tennessee, upheld as constitutional and applied by the Supreme Court of Tennessee, and the rules and regulations of the Federal Aviation Agency here involved" (Jurisdictional Statement, page 13). Appellant then refers to the civil air regulations (14CFR 40.232 (b); Appendix, p. 54a), permitting as a minimum standard of safety the use of only one automatic direction finder (ADF).

The Federal Aviation Act of 1958 expressly provides that the civil air regulations issued by the Administrator thereunder are "minimum standards" only. 49 USC § 1421 (a).

Furthermore, the civil air regulations require the use of two ADFs under certain circumstances. Section 40.406-2(c), page 35 of Civil Aeronautics Manual 40, (Part of Exhibit 17) permits the use of certain ground navigational facilities **"provided the aircraft is equipped with dual automatic direction finder receiver—"** (Emphasis supplied).

Also, under the evidence introduced in this case and as found by the Tennessee Supreme Court, appellant's illfated plane "had only one ADF, and it was not working—" (Opinion of Tennessee Supreme Court, Appendix, p. 18a). This was in direct violation of the civil air regulations relied on by appellant.

ARGUMENT.

Assuming for purposes of argument that this Court has jurisdiction of this appeal under 28 U.S.C. § 1257 (2), we nevertheless respectfully submit that the appeal should be dismissed for the reasons set forth in Grounds 2 and 3 of Appellee's motion to dismiss.

We also submit that if the appeal is treated as a petition for certiorari under 28 U.S.C. § 2103, then the petition for certiorari should be denied because:

(1) Appellant's contention that the doctrine of federal pre-emption precludes state courts from awarding damages according to "its traditional law of torts" in cases where the federal statute provides no remedy for tortious conduct has been settled to the contrary by this Court; and

(2) The Supreme Court of Tennessee has decided this federal question in a way which is in accord with the applicable decisions of this Court.

1. No Substantial Federal Question.

Appellee's action is based on common law negligence. It is an action founded on the "traditional law of torts".

The Federal Aviation Act of 1958 does not create any right of action for wrongful death caused by tortious conduct of an air carrier in the operation of its planes.

Appellee contends that it is settled law that the doctrine of federal pre-emption does not preclude state courts from awarding damages according to "its traditional law of torts" in cases where the federal statute provides no civil remedy for tortious conduct.

This contention of appellee is supported by the following cases:

United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656, 98 L. Ed. 1025; **Int. Union U.A.A. & A.I.W. v. Russell**, 356, U.S. 634, 2 L. Ed. 2d 1030; cf. **San Diego Bldg. Trades Council v. Garmon**, 359 U.S. 236, 243-244, 3 L. Ed. 2d 775, 782, with **Charles Dowd Box Co., Inc. v. John F. Courtney** et al. (Feb. 19, 1962), U.S. , 7 L. Ed. 2d 423; 82 S. Ct. .

See also **Richards v. United States**, (February 26, 1962), US , 7 L Ed 2d 492, 82 S Ct. , which involved wrongful death actions under the Federal Tort Claims Act for airplane passengers killed in a crash occurring in Missouri by reason of alleged acts of negligence occurring in Oklahoma, in which case this Court applied the whole law of the state where the acts of negligence took place, including such state's conflict of laws rules.

The Federal Tort Claims Act provides that the liability of the United States in such cases shall be "in accordance with the law of the place where the act or omission occurred." (28 USC § 1346 (b)).

We believe that this Court will take judicial notice of the large number of tort actions which have been filed against the United States under the Federal Tort Claims Act growing out of airplane crashes. These cases apply the law of the state where the act or omission occurred. (**Richards v. United States**, supra).

If appellant's contention were upheld, the result would be that tort actions between private individuals growing out of airplane crashes would be governed by federal common law while such actions against the United States would be governed by the appropriate state common law. Furthermore, such tort actions against the United States and a private defendant, as co-defendants, would produce the unusual result of applying federal common law to the

private defendant and the appropriate state common law to the United States.

Appellee, therefore, respectfully submits that this appeal should be dismissed because it does not present a substantial federal question.

If the appeal is treated as a petition for certiorari under 28 U.S.C. § 2103, it is submitted that there are no special or important reasons for granting the petition, and that, in the exercise of this Court's discretion, the petition should be denied.

In support of this contention, appellee relies on the facts and the authorities referred to above under the heading of "Jurisdiction", and also in this Section 1 of the Argument. For these reasons, we submit that the Supreme Court of Tennessee, on the question of pre-emption, followed the law as settled by prior decisions of this Court, or, that the state court's decision on this question was in accord with applicable decisions of this Court. **United Construction Workers vs Laburnum Construction Corporation,** supra.

2. **QUESTION OF FEDERAL CONSTITUTIONALITY OF TENNESSEE STATUTES NOT RAISED IN STATE COURTS.**

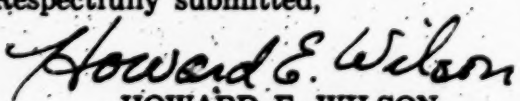
Appellee has pointed out above, in his statement under the heading of "Jurisdiction", that the two sections of the Tennessee Code Annotated, (T.C.A. 42-106 and 42-107) which appellant now contends violates the federal constitution, were not relied on by appellee and were not referred to by the Tennessee Courts. As shown by the opinion of the Tennessee Supreme Court (Appendix to Jurisdictional Statement, pp. 7a-8a), appellee's pleadings merely charged common law negligence and did not charge negligence based upon the alleged violation of any statute of Tennessee. Appellee merely alleged that appellant was guilty of negli-

gence by failing to exercise that degree of care required of carriers under the common law of Tennessee. The federal constitutionality of the two sections of the Tennessee Code Annotated was never drawn in question because appellee was relying on the Tennessee common law rule that the law of the place where a tort (both negligence and injury) is committed will govern the substantive rights of the parties.

CONCLUSION.

Appellee respectfully submits that appellant's appeal should be dismissed, and if the appeal is treated as a petition for certiorari, such petition should be denied.

Respectfully submitted,



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BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

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BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

APPEAL TAKEN IN CONFORMITY TO STATUTE.

In his Brief in Support of his Motion to Dismiss the Appeal, Appellee apparently concedes that the question of whether or not by the enactment of the Federal Aviation Act of 1958 the Congress so occupied the field of aviation as to preclude the state courts from jurisdiction in cases such as this is properly raised and before the Court on this Appeal (Motion to Dismiss Appeal with Brief in Support Thereof, p. 5).

As to the other questions presented by the Appeal, the Appellee contends that this appeal should be dismissed because it was not taken in conformity to statute and because, he insists, no substantial federal question is raised.

In support of his position that this Appeal is not taken in conformity to statute, the Appellee asserts that the question of federal constitutionality of a Tennessee statute was not "drawn in question" in the state court.

We respectfully disagree.

Throughout the state courts, by its pleadings (Record, Vol. I, pp. 29, 33-39), by objections to evidence (Record, Vol. III, pp. 416-420), by objections to the charge of the trial Court (Record, Vol. I, pp. 64-75), by assignments of error in the appellate courts (Record, Vol. VI, pp. 719-723, 725-731), this Appellant insisted that by the Federal Aviation Act of 1958 Congress had so pre-empted the field as to:

(1) Deprive the state courts of jurisdiction of the subject matter;

(2) Make **any law** of Tennessee applied to determine liability unconstitutional;

(3) Make unconstitutional the **application** of any law of Tennessee by the courts of Tennessee.

The Supreme Court of Tennessee passed on each of these questions. In its opinion[1] (Appendix to Jurisdic-

[1] In Appellee's Brief (p. 6) mention is made of the fact that at pages 10 and 11 of Appellant's Jurisdictional Statement there is a quotation of a portion of the Opinion of the Tennessee Supreme Court without any indication showing that the quotation was not complete and that there were certain omissions in the portion of the Opinion printed in the Jurisdictional Statement.

In the Jurisdictional Statement as prepared for the printer there was an indication that certain omissions had been made in the quotation, but through error such omissions were not indicated in the final printing. This error is sincerely regretted by counsel.

However, in the Appendix to the Appellant's Jurisdictional Statement the full Opinion of the Tennessee Supreme Court is set forth.

tional Statement, p. 4a), that Court stated the issue as follows:

> "**First.** Petitioner contends that by the Federal Aviation Act of 1958, 49 U. S. C. A., Sec. 1301 et seq., Congress took control of the air-space of the United States, set up a federal agency to license and regulate the operation of aircraft, and pre-empted the field so as to supplant **all state law** and state court jurisdiction therein; and that this action should be dismissed because the state court has no jurisdiction of it and **no state law may be applied to it**". (Emphasis ours).

The Supreme Court of Tennessee then proceeded to construe the provisions of the Federal Aviation Act of 1958, and concluded:

> "The Federal Aviation Act of 1958 appears to be merely an administrative measure, limited to the regulation of the operation of aircraft in the interest of public safety. It does not touch the traditional area of the law of torts or private right. . . ."
>
> (Appendix p. 7a.)
>
> ". . . it (this) is a suit in tort upon a right created by the law of the state . . ."
>
> (Appendix p. 7a.)
>
> ". . . the state courts has jurisdiction in this case . . ."
>
> (Appendix p. 7a.)
>
> ". . . this Act does not exclude state law not inconsistent with its purpose."
>
> (Appendix p. 5a.)

The Supreme Court of Tennessee then, to determine the question of negligence, applied the law of Tennessee, and based upon its finding that a jury question on violation

of the state law was presented, it disregarded the federal statutes and affirmed a judgment against Southeast Airlines.

The Supreme Court of Tennessee in reaching this result proceeded upon the theory that the transaction involved did not fall within the protection and reach of the Supremacy Clause of the Constitution of the United States because of its conclusion that the Congress, by the enactment of the Federal Aviation Act of 1958, had not occupied the field to the exclusion of state regulation and control of aircraft and the operation thereof within the airspace of the United States. The Tennessee Court thus applied and enforced to plaintiff's disadvantage, state law, in accordance with Sections 42-106 and 42-107 of Tennessee Code Annotated, which law the defendant insisted as applied and enforced was repugnant to the Constitution of the United States and void.

We respectfully insist that under these circumstances, this case falls within the rule announced by this Court in the case of **Dahne-Walker v. Bondurant**, 257 U. S. 282, wherein the Court said:

> "... as the state court applied and enforced to the plaintiff's disadvantage state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error."

Appellee insists that inasmuch as he did not rely upon the violation of a specific statute of Tennessee relating to the equipping or operation of airplanes, and the law applied and enforced by the courts of Tennessee was the common law of the State, no **statute** of the State was upheld by the judgment of the Supreme Court of the State, despite the provisions of Sections 42-106 and 42-107 of Tennessee Code Annotated.

Neither a litigant nor the Courts of any sovereign state can by silence render nugatory the solemn acts of the legislative body of that state. In applying and enforcing the common law of Tennessee, over the objection of the Appellant that such law was void and unconstitutional as to the transaction out of which the litigation arose, the Supreme Court of Tennessee necessarily upheld the validity of Sections 42-106 and 42-107 of Tennessee Code Annotated authorizing the application of such law and upheld a statute of the state over the insistence of the defendant that as applied such statute was invalid because in conflict with the federal constitution.

The cases of **Anonymous v. Baker**, 360 U. S. 287, and **Rohr Aircraft Corporation v. County of San Diego**, 362 U. S. 628, cited by Appellee (Brief, p. 5) are not applicable here.

In the case of **Anonymous v. Baker**, 360 U. S. 287, the Federal Constitutionality of the state law was never presented to the state courts of New York. It was raised for the first time on the appeal to the Supreme Court of the United States. This is an entirely different situation from that presented in the case at bar, where the record shows that in the trial court, in the intermediate appellate court, and in the Supreme Court of the State, the Appellant insisted that the state law was unconstitutional because it was in contravention of the Federal Constitution.

In the case of **Rohr Aircraft Corporation v. County of San Diego**, 362 U. S. 628, it appears that the Appellant did not question the constitutionality of the California statute imposing taxes upon property owned by the Reconstruction Finance Corporation, but attacked the tax assessment on the ground that such assessment infringed the taxpayer's federal rights, privileges or immunities. Such an attack does not, as we understand the law, sup-

port an appeal to this Court but only a review upon Petition for Certiorari.

In the case at bar, the Appellant insisted at every opportunity in the state courts that the state law as applied was repugnant to the Constitution of the United States. Appellant also insisted in the state courts that the application of the law of Tennessee infringed its federal rights, privileges and immunities. Inasmuch as the Appellant herein couched its objections in the state court on both theories, we submit that it properly comes into this Court on an appeal under Section 28 U. S. C. 1257 (2). In the alternative it can have a review of the judgment of the Tennessee Supreme Court on Petition for Certiorari under 28 U. S. C. 1257 (3).

Therefore, if this case is not properly here by appeal, we respectfully ask that the Court consider the appeal as a petition for writ of certiorari and grant the writ.

SUBSTANTIAL FEDERAL QUESTION PRESENTED.

Appellee asserts that no substantial federal question is presented by this Appeal because it is settled law that the doctrine of federal pre-emption does not preclude state courts from awarding damages according to its traditional law of torts in cases where the federal statute provides no civil remedy for tortious conduct.

We most respectfully insist that such is not the law. Although in some instances where the field has been otherwise pre-empted by federal legislation this Court has permitted the states to grant compensation for the consequences of tortious conduct as determined by their traditional law of torts, this Court has never hesitated to abrogate state law where satisfied that Congress has completely occupied the field, or where the enforcement of state law would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Time after time since Chief Justice Marshall made the pronouncement in **M'Culloch v. Maryland** (U. S., 4 Wheat. 316, 427), this Court has reiterated and applied the following Rule:

> "It is of the very essence of supremacy to remove all obstacles to its own action within its own sphere, and to so modify every power vested in subordinate governments, as to exempt its own operations from all other influence."

Moreover, a state cannot circumvent or abrogate the federal statute by applying its own laws of private right. In the recent case of **Free v. Bland** (May 21, 1962), ... U. S. ..., 8 L. ed. (2d) 180, this Court held that the right of survivorship in United States government bonds is to be determined by federal law, which prevails over conflicting Texas community property law. In that case the Supreme Court of Texas, in holding that the right of survivorship was to be determined by the law of Texas, said:

> "'It is clear that the Federal regulations do not override our local laws in matters of purely private ownership where the interests of the United States are not involved. Bank of America Trust & Savings Ass'n v. Parnell, 352 U. S. 29.'"

This Court, speaking through Chief Justice Warren, reversed, saying:

> "The Supreme Court of Texas's interpretation of the Supremacy Clause is not in accord with the controlling doctrine. The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article 6, Clause 2. This principle was made clear by Chief Justice Marshall when he stated for the Court

that any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield."

In the case of **Garner v. Teamsters C & H Union**, 346 U. S. 485, this Court said:

"We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded."

In the case of **Farmers' Educational and Cooperative Union of America v. WDAY, Inc.**, 360 U. S. 525, this Court affirmed the decision of the Supreme Court of North Dakota in dismissing a complaint for libel on the ground that Section 315 of the Federal Communications Act of 1934 pre-empted the field and rendered the defendant radio station immune from liability despite the North Dakota libel laws. In that case this Court, speaking through Mr. Justice Black, said:

"We are aware that causes of action for libel are widely recognized throughout the States. But we have not hesitated to abrogate state law where satisfied that its enforcement would stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"

In the case of **San Diego Building Trades Council v. Garmon**, 359 U. S. 236, this Court found that by the National Labor Relations Act the Congress of the United

States had so pre-empted the field that state power and state jurisdiction to award damages for tortious conduct must yield to the federal law. In that case the Court said:

> "Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme."

Thus, it is clear that the regulation of any field within the federal sphere cannot be curtailed or circumvented by the application of state law in tort actions between private citizens. In all cases where state law is attacked as invalid because supplanted by federal law, the question is: Has the Congress supplanted state law? Such is the question here.

We respectfully insist that by the Federal Aviation Act of 1958, the Congress did pre-empt the field and supplant all state law relative to the control of aircraft and the operation thereof in the navigable air space of the United States.

It is clear that the control of aircraft and the operation of aircraft within the navigable air space of the United States are in the federal domain and that Congress may take unto itself all regulatory authority over them.

We respectfully insist that in enacting the Federal Aviation Act of 1958, it was the clear and manifest purpose of the Congress to supersede the powers of the states with reference to the regulations of aircraft and the operation thereof in the navigable air space of the United States.

As this Court pointed out in the cases of **Rice v. Santa Fe Elevator Corp.**, 331 U. S. 218, and **Pennsylvania v. Nelson**, 350 U. S. 497, there are a number of ways in which the Congress may manifest its intent to pre-empt the field.

Applying these tests to the Federal Aviation Act of 1958, we find:

(1) The scheme of federal regulation provided by the Act is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.

(2) Centralized control of aircraft and their operation is a field which transcends the purely local interest of the states and is one in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

(3) The uniformity of regulations relating to all aircraft and the operation of all aircraft in the navigable air space of the United States sought to be obtained by the Federal Aviation Act of 1958 reveals the purpose of the Congress to preclude enforcement of state laws on the same subject.

(4) State policy may produce a result inconsistent with the objectives of the Act.

The case of **Richards v. The United States** (February 26, 1962), ... U. S. ..., 7 L. ed. (2d) 492, cited at page 12 of Appellee's brief has no application to the case at bar. The accident out of which that case arose occurred prior to the enactment of the Federal Aviation Act of 1958, and the negligence complained of was the failure of the United States to enforce the terms of the Civil Aeronautics Act of 1938. The Act of 1958 is much broader in scope and more detailed and comprehensive than was the Civil Aeronautics Act of 1938.

Moreover in the **Richards** case, the question of preemption was not before the Court, and hence was given no consideration.

CONCLUSION

For the reasons heretofore indicated, it is most respectfully insisted that the motion to dismiss filed by the Appellee should be denied and the case ordered to stand for argument.

Respectfully submitted,

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